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### Lobbying and the Petition Clause

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## ARTICLE

**Lobbying and the Petition Clause**

Maggie McKinley\*

**Abstract.** Contrary to popular opinion, the Supreme Court has not yet resolved whether lobbying is constitutionally protected. Belying this fact, courts, Congress, and scholars mistakenly assume that lobbying is protected under the Petition Clause. Because scholars have shared the mistaken assumption that the Petition Clause protects the practice of “lobbying,” no research to date has looked closely at the Petition Clause doctrine and the history of petitioning in relation to lobbying. In a recent opinion addressing petitioning in another context, the Supreme Court unearthed the long history behind the right to petition and argued for the importance of this history for future interpretation of the Petition Clause.

Following the Supreme Court’s direction, this Article examines the implications of the history of petitioning for lobbying and, drawing from recent empirical research on lobbying, argues that the way Congress engages with the public through our current lobbying system actually violates the right to petition. At the Founding, and for much of this Nation’s history, the right to petition protected a formal, transparent platform for individual—and, in particular, minority—voices to participate in the lawmaking process. Without regard to the number of signers or the political power of the petitioner, petitions received equal process and consideration. This platform allowed both the enfranchised and unenfranchised to gain access to lawmakers on equal footing. Women, African Americans, and Native Americans all engaged in petitioning activity, and Congress attended to each equally.

Moving beyond ahistorical, decontextualized interpretations of the Petition Clause, this Article posits that our current lobbying system—wherein access and procedure are

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informal, opaque, and based on political power—actually violates the right to petition, which provided access and formal procedure without respect to the political power of the petitioner. The history of petitioning teaches that affording access to the lawmaking process on the basis of an individual’s political power makes as little sense as affording access to courts on such a basis.

This history suggests the need for revisiting the Petition Clause doctrine. On the one hand, it argues for a stronger petition right, especially a right to consideration and response. On the other hand, it suggests a narrowed petition right that protects only practices that correspond with the traditional practice of petitioning. Fundamentally, this Article demonstrates that a contextualized understanding of the Petition Clause, grounded in an accurate historical frame, requires comprehensive reform of our lobbying system and a formalization of the petition process in order to preserve our republican form of government.

### **Table of Contents**

Table of Contents.....	1132
Introduction .....	1133
I. Contextualizing the Petition Clause .....	1142
A. Contextualizing Petitioning.....	1142
B. Contextualizing the Text .....	1147
C. Contextualizing Lobbying .....	1154
II. The “Decontextualized” Petition Clause .....	1156
A. Our Lobbying Regulatory Framework.....	1156
B. Our Muddled Petition Clause Doctrine .....	1162
1. Origins.....	1165
2. Applying the clause to “lobbying” .....	1168
3. Expanding the clause to courts and the executive.....	1170
4. Conflating the clause into speech.....	1174
5. An historic revival.....	1178
III. Implications for the Doctrine .....	1182
A. Contours of a Contextualized Right to Petition .....	1182
B. Implications for the Doctrine.....	1186
1. Making sense of contingency fee contracts.....	1189
2. Lobbying is not the new campaign finance.....	1190
IV. Contextualizing Our Current Lobbying System .....	1195
A. Our Current Lobbying System.....	1195
B. Implications of the Petition Right for Our Lobbying System.....	1198
1. Remedies .....	1199
2. Objections.....	1201
Conclusion .....	1205

## Introduction

Imagine that when you filed a complaint in a court, the judge first reviewed the document to count the number of signatures or to determine whether any of the signers had contributed to the judge's campaign. If the judge identified enough signatures or identified the signature of a contributor, the judge might accept your filing; otherwise, she might refuse to accept the complaint and decline to hear the case entirely. Even if she allowed the case to proceed, the judge might hold the proceedings in secret, meeting informally with parties and individuals unrelated to your action, and refuse to make public any of the filings in the action. If the judge held a close relationship with a powerful individual interested in the case, she might allow that third party to send her instructions by text message that would guide her questions and actions during trial. The judge might also afford you entirely different process than other litigants: if she thought that you were politically powerful, she might provide you comprehensive hearings and a trial. Otherwise, she might allow you a five-minute phone conference without ever reading your submissions. She might also provide you no process at all, abandoning your complaint to a wastepaper basket. There is little doubt that this scenario would offend deeply our notions of the right to due process in the context of courts because we believe that the right means equal, formal, and public process. That we accept less when we, as members of the public, engage with Congress appears more historical accident than anything grounded in reason.

Congress's engagement with the public outside of the vote inevitably presents challenging regulatory and constitutional questions. On the one hand, lawmakers have a strong need to gather information about the public to facilitate the lawmaking process, and the public is often the only source. The Constitution also protects explicitly "the right . . . to petition," or the right to engage directly with government, "for a redress of grievances."<sup>1</sup> On the other hand, our informal and largely unregulated lobbying system is prone to abuse, risks disruption and distortion of our lawmaking process, and has contributed to an alarming loss of public faith in Congress.<sup>2</sup> The minimal scholarly debate to engage with the puzzle of lobbying conflates lobbying and petitioning and

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1. U.S. CONST. amend. I.

2. The low approval rating and steep decline in confidence in Congress has been well documented. See, e.g., *Is Congress for Sale?*, RASMUSSEN REP. (July 9, 2015), [http://www.rasmussenreports.com/public\\_content/archive/mood\\_of\\_america\\_archive/congressional\\_performance/is\\_congress\\_for\\_sale](http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/congressional_performance/is_congress_for_sale) (reporting survey results that only 13% of respondents approved of Congress, with 56% responding that Congress does its job "poorly" and 59% responding that most members are willing to sell their votes); Rebecca Riffkin, *Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP (June 19, 2014), <http://www.gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx> (reporting survey results of only 7% of respondents having a "great deal" or "quite a lot" of confidence in Congress, down from 42% in 1973—the first year of the survey).

assumes away the question whether the First Amendment protects our current lobbying system.<sup>3</sup> Likely because of this assumption, few scholars have considered whether lobbying and petitioning are coextensive and, if not, how Congress ought to engage with the public in order to comport with the petition right. The literature instead focuses narrowly on whether our current lobbying system should or could be regulated<sup>4</sup>—or potentially even subsidized<sup>5</sup>—in accordance with the Constitution. Little scholarly work has been done to examine the contours of the right to petition in the context of our current lobbying system and to answer the question of how a legislature of republican design ought to engage with the public during the lawmaking process, if at all.<sup>6</sup> Despite presenting important questions regarding the institutional design of our legislatures, the little attention these questions have received by legal scholars and the courts has fostered only deeper confusion.

To resolve decades of confusion in a single article is a chimera. Rather, this Article aims to reshape the dialogue regarding public engagement with

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3. One telling example arises from the introductory article to the *Stanford Law & Policy Review's* special edition on lobbying. Alan B. Morrison, *Introduction: Lobbyists—Saints or Sinners?*, 19 STAN. L. & POL'Y REV. 1 (2008). Alan Morrison opens his introduction to the edition asking whether lobbyists are “saints” or “sinners.” *Id.* at 1 (capitalization altered). He then quickly concludes that “the answer does not really matter . . . because, as all the authors recognize, the right to lobby is the right to petition the government for redress of grievances, which is explicitly protected by the First Amendment.” *Id.* (making this statement without citation); see also Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160, 163 (2014); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 196 (2012); Andrew P. Thomas, *Easing the Pressure on Pressure Groups: Toward a Constitutional Right to Lobby*, 16 HARV. J.L. & PUB. POL'Y 149, 172 (1993). For a very recent and very rare exception, see Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 6 (2014), which notes that the scope of the lobbying right is “unclear.”
  4. See, e.g., Hasen, *supra* note 3, at 197.
  5. Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 89-90 (2014); Heather Gerken, Keynote Address: Lobbying as the New Campaign Finance, Remarks at the Georgia State University Law Review Symposium (Nov. 12, 2010), in 27 GA. ST. U.L. REV. 1155, 1167-68 (2011).
  6. Notably, the terms “petition” and “lobbying” are not listed in the tables of contents or indices of most First Amendment casebooks. See, e.g., WILLIAM COHEN, *THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE* (2003); JOHN H. GARVEY & FREDERICK SCHAUER, *THE FIRST AMENDMENT: A READER* (1992); ARTHUR D. HELLMAN ET AL., *FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION* (3d ed. 2014); RONALD J. KROTOSZYNSKI, JR. ET AL., *THE FIRST AMENDMENT: CASES AND THEORY* (2008); ARNOLD H. LOEWY, *THE FIRST AMENDMENT: CASES AND MATERIALS* (1999); STEVEN H. SHIFFRIN ET AL., *THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS* (6th ed. 2015); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW* (5th ed. 2013); EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* (4th ed. 2011); RUSSELL L. WEAVER ET AL., *THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS* (2d ed. 2008).

Congress. First, this Article seeks to unsettle the presumption that the Supreme Court has resolved definitively that lobbying is protected by the First Amendment. Second, this Article aims to clarify the reach and meaning of the Petition Clause by charting the little-known history of the petition process and the history of lobbying and by addressing the Petition Clause doctrine comprehensively for the first time. Finally, the Article puts forth the heterodox argument that our current lobbying system<sup>7</sup> actually violates the right to petition.

Although the Supreme Court often alludes in dicta to presumed constitutional limitations on Congress's ability to regulate our current lobbying system,<sup>8</sup> the Court has yet to resolve the issue. The two cases generally cited for the principle that lobbying is protected under the Petition Clause<sup>9</sup> fail to support that claim. In the most often cited case, *United States v. Harriss*, the Court actually declined explicitly to reach the issue whether the statute's penalty of a three-year lobbying ban violated the Petition Clause.<sup>10</sup> The Court's first in-depth discussion of lobbying and the Petition Clause, *Noerr* of the *Noerr-Pennington* doctrine, interpreted lobbying activity as an exception

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7. A definitional clarification is in order. Much of our discourse around "lobbying" fails to distinguish between the private conduct of the individuals we call "lobbyists" and the state action of Congress in providing access to the lawmaking process to those individual lobbyists and others in order to "lobby." It is the latter that is the focus of this Article. Lobbyists, as individuals, can engage in a range of activities, including running for office, contributing to electoral campaigns, and publishing op-eds, but these individuals become lobbyists only by "lobbying," or by engaging directly with government, usually Congress. Engaging directly with Congress implicates more than simply private conduct; it necessarily implies some form of reception or, at the very least, acquiescence or acknowledgement from the other side. For example, a lobbyist cannot engage in paradigmatic lobbying behavior—that is, a meeting with a member of Congress—without the member affording the lobbyist access and process. This Article takes the approach that this system of direct engagement with Congress—because it implicates state action and raises distinct constitutional and regulatory concerns—should be treated separately and refers to this system separately as our "lobbying system."

8. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 369 (2010) ("And the Court has upheld registration and disclosure requirements on lobbyists, *even though Congress has no power to ban lobbying itself*." (emphasis added)). In *United States v. Harriss*, the Court upheld disclosure requirements under an earlier version of the compelled-speech doctrine but declined explicitly to reach the question whether the statute's three-year lobbying ban penalty violated the Petition Clause. 347 U.S. 612, 625-27 (1954).

9. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *Harriss*, 347 U.S. at 626-27.

10. *Harriss*, 347 U.S. at 627. The Court also mentioned the Petition Clause in its survey application of the First Amendment to a mandatory disclosure requirement, but its analysis of the requirement resembled more closely its doctrine on compelled speech—the doctrine the Court applies today in the context of disclosure regimes. See, e.g., *Doe v. Reed*, 561 U.S. 186, 194-95 (2010) (analyzing under the compelled-speech doctrine a state statute compelling public disclosure of the names and addresses of petition signers).

to the Sherman Act in order to shield it from allegations of anticompetitive conduct, citing Petition Clause concerns in part.<sup>11</sup> As later cases have highlighted, however, it is unclear whether the Court rested the *Noerr-Pennington* lobbying exception on the Petition Clause or on simple statutory interpretation and the legislative history of the Act.<sup>12</sup> The majority of case law interpreting the Petition Clause focuses not on lobbying or even legislative petitioning but on access to courts and formal agency proceedings.<sup>13</sup> Belying the nearly ubiquitous consensus that any and all forms of lobbying activity are coextensive to petitioning and, therefore, are protected under the Petition Clause, the constitutional protections for our current lobbying system remain a very open question.

Looking to the historical record to clarify the reach and meaning of the Petition Clause reveals that our lobbying system and the system protected by the petition right are wholly distinct. At the Founding, and for much of this Nation's history, the right protected a form of access to Congress that more closely resembled the formal process afforded in courts than the informal tool of mass politics that lobbying and petitioning have become today.<sup>14</sup> Individuals submitted over six hundred petitions to the first Congress—each a formal document that included a statement of grievance and a signatory list—which members of Congress read aloud on the floor, referred to a committee or another branch for consideration, and afforded a formal response.<sup>15</sup> Women, African Americans, and Native Americans had all engaged with colonial and

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11. *Noerr*, 365 U.S. at 137-38.

12. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2502-03 (2011) (Scalia, J., concurring in part and dissenting in part).

13. *See infra* Part II.B.

14. The most well-known contemporary example is the Obama Administration's "We the People" website that allows the public to "petition" the executive. WE THE PEOPLE, <https://petitions.whitehouse.gov> (last visited May 5, 2016). The Obama Administration describes the "We the People" petition website as a supplement to, not a displacement of, the "current official methods of communication" with the executive. *Terms of Participation*, WE THE PEOPLE, <https://petitions.whitehouse.gov/how-why/terms-participation> (last visited May 5, 2016). As of January 2013, the Obama Administration promises that petitions are made available to the public in a searchable database if the petition garners 150 signatures in thirty days and promises an official response to petitions that garner more than 100,000 signatures in thirty days. *Id.* The website initially required only 5000 signatures in thirty days, but increasing use of the website motivated the Obama Administration to increase the threshold for response to 25,000 signatures and then 100,000. Macon Phillips, *Why We're Raising the Signature Threshold for We the People*, WHITE HOUSE (Jan. 15, 2013, 6:00 PM ET), <https://www.whitehouse.gov/blog/2013/01/15/why-we-re-raising-signature-threshold-we-people>. An examination of the historical petition right could call into question the constitutionality of this novel model of petitioning the executive. *See infra* Part III.A.

15. *See infra* Part I.A.

state governments through the petition process as a matter of course,<sup>16</sup> and these unenfranchised and politically powerless communities transitioned smoothly to petitioning Congress after the Founding.<sup>17</sup> Members did not afford more process or consideration to petitions with more signatures and did not require a minimum level of electoral power, or signature count, in order to provide formal process to a petition.<sup>18</sup> Much like a complaint filed with a court, Congress treated each petition on equal footing—no matter the petition’s source and without regard to the political power of the petitioner<sup>19</sup>—and consideration was a public, transparent process.<sup>20</sup>

By contrast, the lobbying market functioned (and still functions) as the antithesis of the formal petition process. Historically, the lobbying market auctioned informal access to lawmakers—access acquired through bribes, personal connections, threats, and electoral pressure.<sup>21</sup> Lobbyists cultivated relationships with members of Congress in order to offer their clients more access and more comprehensive process than those individuals who engaged in the formal petition process.<sup>22</sup> Professional lobbyists might themselves engage in petitioning, and petitioners might, on occasion, employ lobbyists to represent them in the formal petition process.<sup>23</sup> The lobbying industry, however, was largely distinct from the formal petition process and inspired incredible public resentment at the fact that lobbyists circumvented and undermined the legitimate system of public engagement—namely, petitioning.<sup>24</sup> State governments criminalized lobbying, and courts were quick to void contracts for lobbying services as violative of public policy because they saw the sale of one’s own personal, informal access as a corruption of petitioning.<sup>25</sup> In most cases, the courts were clear that engaging in the formal petition process or hiring a representative to engage in the formal petition

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16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See, e.g.,* Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 57, 57-99 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) [hereinafter *HOUSE AND SENATE*] (surveying petitions submitted to Congress during the 1790s and noting the advantages gentility afforded to individuals seeking to influence the early Congress).

22. *Id.* at 58-62.

23. *Id.* at 60-65.

24. *Id.* at 60-61.

25. Teachout, *supra* note 3, at 7.



process on your behalf would not raise the same concerns;<sup>26</sup> such contracts might even obtain constitutional protection.<sup>27</sup> It was only in contracting for “lobbying” services—specifically, the sale of a lobbyist’s ability to circumvent the formal petition process—that public policy was offended.<sup>28</sup>

The historical process of petitioning bears little resemblance to the way that Congress engages with the public today. Today, Congress affords individuals access to lawmakers and the lawmaking process only on an informal basis and provides preferential access, consideration, and procedure to the politically powerful.<sup>29</sup> Gone is the public process whereby petitions were read into the congressional record, and in its place is a process closed to public scrutiny,<sup>30</sup> with little to no public record outside of the compelled self-disclosure reports mandated by the Lobbying Disclosure Act.<sup>31</sup> In essence, our legitimate petitioning right has been supplanted by the illegitimate lobbying system that was seen as undermining the right to petition. We have increasingly taken this substitution for granted.<sup>32</sup> But the history of

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26. *See, e.g.*, *Trist v. Child*, 88 U.S. (21 Wall.) 441, 449-50 (1874) (voiding a lobbying contingency fee contract as against public policy and distinguishing the lobbying contract from a contract for “purely professional services” such as “drafting [a] petition . . . attending to the taking of testimony, collecting facts, [and] preparing arguments . . . to a committee or other proper authority”).
27. *See, e.g.*, *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 334-36 (1853) (holding contracts “to use personal or any secret or sinister influence on legislators” or contingency fee contracts as void against public policy but noting that all affected have an “undoubted right” to urge their claims before legislative committees so long as it is done honestly, openly, and candidly).
28. *Trist*, 88 U.S. (21 Wall.) at 448-50.
29. *See infra* Part IV.A.
30. *Id.*
31. 2 U.S.C. § 1604 (2014). The disclosure regime of the Lobbying Disclosure Act has also been widely criticized as ineffective and out of date. *See, e.g.*, TASK FORCE ON FED. LOBBYING LAWS, AM. BAR ASS’N, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS, at vii (2011).
32. A recent example occurred in a challenge to the Obama Administration’s policy of banning lobbyists from serving on certain advisory commissions. *See Autor v. Pritzker*, 740 F.3d 176, 177-78 (D.C. Cir. 2014). The administration had campaigned on an antilobbyist platform and, after taking office, implemented a number of restrictions on lobbyist engagement with the executive, including the advisory commission ban. Bob Bauer, Assessing Lobbying Reform in the Obama Administration, Presentation to the American University Conference on Lobbying Reform in the U.S. and the E.U. (Mar. 17, 2014), <https://www.american.edu/spa/ccps/upload/Bauer-remarks.pdf>. A cohort of lobbyists challenged the ban as an unconstitutional condition on their petition rights. *Autor*, 740 F.3d at 177-78. During the litigation, the Obama Administration *conceded* that lobbying was protected by the Petition Clause, despite the fact that the Supreme Court has yet to wholly resolve the issue. *Id.* at 182 (“[T]he government acknowledges, as it must, that registered lobbyists are protected by the First Amendment right to petition.”); *see also infra* Part III.B. The administration subsequently declined to appeal the adverse ruling and instead withdrew the ban.

petitioning teaches that our procedural rights to engage with legislatures and our procedural due process rights in courts should not be so distinct.

What little effort Congress has undertaken to regulate lobbying and the little doctrine that has developed around the Petition Clause have yet to recognize this history. Instead our regulatory frameworks and doctrine simply assume that lobbying and petitioning are coextensive and reflect the struggle to define the petition right against a background of changed circumstances. In the absence of any context to provide meaning to the Petition Clause, in 1985 the Court eventually conflated the right to petition with the Free Speech Clause in *McDonald v. Smith*.<sup>33</sup> However, the Supreme Court has recently indicated that it could be receptive to the history of petitioning when reinvigorating the Petition Clause. Following *McDonald*, scholars rushed to unearth the history of petitioning in order to criticize the Court's conflation of the Petition and Free Speech Clauses and to argue for a distinctive Petition Clause doctrine grounded in that history.<sup>34</sup> In 2011, the Supreme Court, citing the long-established importance of history in interpreting the First Amendment,<sup>35</sup> relied on this newly unearthed history in the context of judicial and executive "petitioning" to establish a Petition Clause doctrine distinct from free speech.<sup>36</sup>

Part I follows the Court's lead in *Guarnieri* and provides a thick description<sup>37</sup> of the Petition Clause in order to clarify our Petition Clause

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33. 472 U.S. 479, 480 (1985).

34. See, e.g., Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (excavating the history of petitioning and arguing for a distinctive Petition Clause doctrine); Eric Schnapper, "Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law, 74 IOWA L. REV. 303 (1989) (same); Norman B. Smith, "Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986) (same); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993) (same); Stephen A. Higginson, Note, *A Short History of the Right to Petition the Government for Redress of Grievances*, 96 YALE L.J. 142 (1986) (same). The burgeoning discourse of historical scholarship around the Petition Clause even fostered dissent. See, e.g., Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740-41 (1999).

35. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2498 (2011) ("Some effort must be made to identify the historic and fundamental principles that led to the enumeration of the right to petition in the First Amendment, among other rights fundamental to liberty.").

36. *Id.* at 2495 ("Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims. Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." (citations omitted)).

37. Modeling the Supreme Court's method of interpretation in *Guarnieri*, this Article draws upon historical sources as a means to contextualize or provide a "thick

doctrine with respect to legislative petitioning. In particular, Part I aims to contextualize the Petition Clause within the history of the text's drafting, the history of petitioning, and the history of the distinct practice of lobbying.<sup>38</sup>

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description" in order to understand the meaning ascribed to these terms. This method relies heavily on the work of semiotician and anthropologist Clifford Geertz, who advocated a "thick description" or contextualization of a focus of inquiry in order to understand its meaning. Clifford Geertz, *Thick Description: Toward an Interpretative Theory of Culture*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3, 14 (1973). Legal historian Saul Cornell has commented that an historical application of Gricean pragmatics would resemble a Geertzian thick description and has remarked upon Geertz's recent contribution to historical methodology. Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 302 n.25 (2011).

38. We have, in our constitutional culture, become tribal. To point to text and history, at least for some, is to join ranks with the tribe of originalists and the ideology that imbues that tribe. Although I am quite supportive of tribalism in other contexts, I find this simplification of methodology problematic. Clearing the theoretical thicket around the differences between the use of text and history and the methodology called "originalism" is beyond the scope of this Article. I reserve this question for later work, where I might clear the thicket more precisely. But a point of clarification is in order here to avoid any distraction prompted by this methodological tribalism.

Praising fidelity to constitutional text within historical context is an acceptable means of constitutional interpretation within a range of methodologies, including Dworkin's moral reading. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1251-52 (1997). In reaching a "moral reading," Dworkin claims that we must first look to constitutional text to resolve the "best sense of the Framers speaking as they did in the context in which they spoke." *Id.* at 1253. In particular, we must look to the meaning of the text at the time of the Framing in order to resolve whether the text involves a set meaning or an abstract principle. *Id.* It is only the latter that involves a moral reading. *Id.* (contrasting the abstract terms of "cruel" within the Eighth Amendment and "equal" within the Fourteenth Amendment against the constitutional requirement that the President meet or exceed the age of thirty-five). Constitutional text with a fixed meaning, according to Dworkin, is subject to a form of textualism even when applying the moral reading methodology. *Id.* at 1251-52. In describing his form of textualism, a method that he claimed to share with Justice Scalia and Laurence Tribe, Dworkin provides an example apropos of the Petition Clause. *Id.* at 1256-62.

In describing his moral reading methodology, Dworkin points to history to resolve ambiguities in meaning for these nonabstract constitutional terms and, to illustrate, he describes a passage from Shakespeare's *Hamlet* where Hamlet "said to his sometime friends, 'I know a hawk from a handsaw.'" *Id.* at 1251 (quoting WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2). But the question arises "whether Hamlet was using the word 'hawk' that designates a kind of a bird, or the different word that designates a Renaissance tool." *Id.* at 1251. To resolve this question, "[w]e must begin, in my view, by asking what—on the best evidence available—the authors of the text in question intended to say" and "[i]f we apply that standard to Hamlet, it's plain that we must read his claim as referring not to a bird, which would make the claim an extremely silly one, but to a renaissance tool." *Id.* at 1252. So it would appear that, in calling for textual fidelity to the term "petition" in the Petition Clause, I would likely have the spirits of both Dworkin and Scalia on my side.

This Part focuses on the little-known history of petitioning, a formal practice that once constituted a vital mechanism of the legislative process.

In Part II, I present the regulatory and doctrinal muddle around lobbying and the Petition Clause doctrine as a prime case study in the problems that arise from textualist interpretive methods that fail to take account of context<sup>39</sup>—in this case, an early and highly criticized version of textualism developed by Hugo Black that interpreted the Petition Clause without reference to the history that would have provided a clarified and stable meaning to the text.<sup>40</sup> In particular, Part II advances the argument that interpreting constitutional text, in the absence of a contextualized understanding of petitioning and lobbying, resulted in an overbroad and inconsistent application of the Clause.

Part III relies on the thick description of petitioning to argue for a partial revisitation of the Petition Clause doctrine. Part III first argues that the Court should narrow the right to petition and disambiguate “petitioning” from “lobbying.” Specifically, it posits that the petition right protects only direct engagement with government and that the right would not protect other forms of “lobbying,” including informal engagement with government or public-directed advocacy. Part III then argues that the Court should strengthen the right to petition to guarantee equal and open access to the legislature through a formal, public process and to guarantee consideration and response. Lastly, Part III provides two examples of implications for the Petition Clause doctrine.

Part IV describes findings from recent political science studies that show that our current lobbying system does not afford equal, formal access to lawmakers. Rather, the data show that Congress affords access to the lawmaking process both on an informal basis and sorted by the political power

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39. Although statutory and constitutional interpretation scholarship has taken a definitive pragmatic or contextualized turn in the last few decades, what constitutes “context” is an underdeveloped question in legal scholarship. See PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 1-13 (Andrei Marmor & Scott Soames eds., 2011); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951-55 (1995); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-93 (2003); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 165; Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614-16 (2014); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1124-39 (2015). In an effort to begin to remedy this theoretical hole in interpretive scholarship, this Article draws from the fields of neo-Gricean sociolinguistics and linguistic anthropology which have, with the support of empirical study, systematically begun to model context in everyday language use. See, e.g., STEPHEN LEVINSON, PRAGMATICS 22-23 (1983); Alessandro Duranti & Charles Goodwin, *Rethinking Context: An Introduction*, in RETHINKING CONTEXT: LANGUAGE AS AN INTERACTIVE PHENOMENON 1, 1-32 (Alessandro Duranti & Charles Goodwin eds., 1992); Elinor Ochs, *Introduction: What Child Language Can Contribute to Pragmatics*, in DEVELOPMENTAL PRAGMATICS 1, 1-17 (Elinor Ochs & Bambi B. Schieffelin eds., 1979).

40. See *infra* Part II.B.

of the petitioner. Based on these findings, Part IV explores the implications of a contextualized right to petition for our current lobbying system, concluding that our current lobbying system actually violates the right to petition. In particular, this Part argues that a contextualized understanding of petitioning, and the republican values it preserved, could move the debate around lobbying reform away from a fixation on registration and disclosure regimes that simply force transparency within the current taken-for-granted system and toward an affirmative vision of how Congress ought to engage with the public during the lawmaking process.

## I. Contextualizing the Petition Clause

### A. Contextualizing Petitioning

In a strange sense, the year 2015 marked the eight hundredth anniversary of the American right to petition.<sup>41</sup> Magna Charta,<sup>42</sup> a document signed under duress by a reviled English king, might seem at first blush an odd document on which to build our history of American petitioning.<sup>43</sup> But, for the colonists, the document formed a fundamental illustration of the rights and liberties they felt were foundational in their struggle against the British Crown.<sup>44</sup> Benjamin Franklin noted the anniversary of Magna Charta for readers of his *Poor Richard's Almanack* in 1749, to mark the day in remembrance of the document.<sup>45</sup> During the Revolutionary era, Magna Charta took on new life as a model for the demands of independence as it had, by Thomas Paine's estimation, demanded liberties for all men and had been "formed, not in the senate, but in the field; and insisted on by the people, not granted by the crown."<sup>46</sup> His revolutionary advocacy in *Common Sense* urged the colonists to draft a document of independent government that would "answer[] to what is called the Magna Charta of England."<sup>47</sup>

The colonists, an unenfranchised and politically powerless minority, justified the Revolution with and rooted an independent American sovereignty in the failure of the British Crown to comply with its procedural obligations within the petition process and to respond to the colonists'

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41. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 466-67 (1914).

42. As is customary among early Americanist historians, I adopt the eighteenth- and nineteenth-century spelling of the document common at the Founding.

43. MCKECHNIE, *supra* note 41, at 466-67.

44. *See id.*

45. BENJAMIN FRANKLIN, *POOR RICHARD'S ALMANACK* (1749).

46. THOMAS PAINE, *The Forester's Letter III* (1776), reprinted in THOMAS PAINE: *COLLECTED WRITINGS* 74, 81 (1955).

47. THOMAS PAINE, *COMMON SENSE* 31-32 (1776).

petitions.<sup>48</sup> The Revolutionary era's Continental Congress petitioned<sup>49</sup> King George III twice in an effort to avoid full independence from Britain and the war that would necessarily precede it.<sup>50</sup> The first petition was "huddled" into Parliament "amongst a bundle of American papers, and there neglected."<sup>51</sup> Despite the failure of the first attempt, the Continental Congress adopted the second petition, termed the "Olive Branch Petition," on July 8, 1775 and enlisted Richard Penn, former governor of Pennsylvania, to deliver it to the King.<sup>52</sup> But the King refused to receive the colonists' olive branch, and they were told that because he would not formally receive the petition at his throne, he would provide no response.<sup>53</sup> Following its list of grievances, the Declaration of Independence<sup>54</sup> grounded the right to sovereignty and ultimately to war in the failure of the King to respond:

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.<sup>55</sup>

Hardly mentioned at all during the Constitutional Convention, the document constituted an icon of American Revolutionary independence and an historical and moral authority in support of American protest.

Paine was correct that the original document was an act of political protest. In May of 1215, around forty English barons overtook London in an act of rebellion against King John.<sup>56</sup> The following month, the King sued for

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48. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 133 (1997).

49. According to Pauline Maier, under English law, a petition was a form of "address" that asked something of the King. Petitions of right

had a particularly important place in English practice. They gave subjects a way of seeking redress of wrongs done under the authority of the King, whom they could not sue in the regular courts. Petitions of right asked for the recognition of undoubted rights, not mercy, and were directed at the King as the font of justice.

*Id.* at 94.

50. *Id.* at 55.

51. *Id.* (quoting *THE DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS* para. 6 (U.S. 1775)).

52. *Id.* at 57.

53. *Id.* at 58.

54. Declarations, according to Maier, occupied a different function under English law than petitions. "A declaration was a particularly emphatic pronouncement or proclamation that was often explanatory: from the fourteenth century 'declaration' implied 'making clear' or 'telling.' . . . But the word 'declaration' also referred to a legal instrument, a written statement of claims served on the defendant at the commencement of a civil action." *Id.* at 94.

55. *THE DECLARATION OF INDEPENDENCE* para. 4 (U.S. 1776).

56. MCKECHNIE, *supra* note 41, at 35.

peace and agreed to give audience to the barons and their demands and to provide a formal response.<sup>57</sup> The document of demands presented by the barons and grudgingly signed by the King later became known as the Magna Charta, Latin for “the Great Charter.”<sup>58</sup> But Paine’s description of the document as securing broad rights was historical fiction. In grudgingly fixing his seal to the charter, the King granted his barons—hardly the common man envisioned by Paine—future audience before the Crown to present petitions.<sup>59</sup> Petitioners would present petitions, along with a statement of grievances, and would often offer to finance the government in exchange for granting the petition.<sup>60</sup> Not surprisingly, as the financial needs of the Crown increased, so did the volume of petitions afforded an audience before the King.<sup>61</sup> Some have speculated that exponential increase in petitioning led eventually to the institutionalization of Parliament, a term used during the period to denote a discussion and, especially, a formal discussion between the King and those given audience in his court.<sup>62</sup>

In Parliament, petitioning often drove the legislative agenda, which included petitions for public and private matters without any mechanism to distinguish them.<sup>63</sup> Gregory Mark has argued that it was because of the quasi-judicial nature of petitions and the quasi-judicial role of Parliament that Parliament developed an obligation to consider all petitions equally and the public fostered a growing sense of the right to formal consideration of and a response to their petitions.<sup>64</sup> The petitions also allowed Parliament to expand its power vis-à-vis the King.<sup>65</sup> The King was dependent on Parliament and, as the barons had earlier done, Parliament conditioned the granting of money on the King first redressing the petitions submitted to him from Parliament.<sup>66</sup> Petitioning became an intrinsic part of English political life by the seventeenth century, the words “petition” and “bill” were used interchangeably in legislatures, and the petition process was regarded as part of the constitutional framework.<sup>67</sup> Notably, petitioning also served as the primary means of political engagement for the unenfranchised and for collective political

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57. *Id.* at 38.

58. *Id.*

59. See Mark, *supra* note 34, at 2165-66.

60. Spanbauer, *supra* note 34, at 22-23.

61. *Id.* at 23.

62. *Id.*

63. See Mark, *supra* note 34, at 2166.

64. *Id.* at 2166-67.

65. *Id.* at 2167.

66. *Id.*

67. K. Smellie, *Right of Petition*, in 11 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 98, 98 (Edwin R.A. Seligman ed., 1933).

activity, as petitioners formed associations and petitioned on behalf of the collectivity.<sup>68</sup>

English colonists of North America brought with them the English practice of petitioning and began to expand and extend the practice to fit within their new political context.<sup>69</sup> Colonial charters reaffirmed the colonists' right to petition in over fifty provisions, and many colonial assemblies reaffirmed the right.<sup>70</sup> When the Massachusetts General Court established the Body of Liberties in 1641, the first legal code developed by English settlers, it codified the right to petition and articulated its contours in very inclusive terms:

Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publike Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.<sup>71</sup>

Colonists exercising these broad petition rights petitioned on a broad range of matters, spanning from matters of general applicability in the "public interest" to very individual grievances, including many disputes that did not fit in neatly to an existing judicial cause of action.<sup>72</sup> The petition process also began to manifest some of the dynamics of modern day interest group politics.<sup>73</sup> Petitions often addressed the economic needs of different associations, and colonial governments used the petition process, including the review of counterpetitions from competing groups, to negotiate between competing economic interests within their developing economies.<sup>74</sup>

In addition to associational activity, the petition process also catered to the needs of individuals and political minorities.<sup>75</sup> Like the Massachusetts Body of Liberties, many colonial governments either explicitly or implicitly opened the petition process to the unenfranchised and disenfranchised, and these

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68. See, e.g., Mark, *supra* note 34, at 2169-70.

69. See JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 25 (1986).

70. See Mark, *supra* note 34, at 2175 n.90.

71. *A Coppie of the Liberties of the Massachusetts Collonie in New England*, in 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 122, 124 (Zechariah Chafee, Jr. ed., 1963).

72. See Higginson, *supra* note 34, at 145.

73. See *id.* at 150-51.

74. *Id.*

75. See, e.g., RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 44 (1979).



groups took full advantage of the process.<sup>76</sup> Prisoners petitioned in quasi-habeas terms to alter judgments, but they also petitioned to alter sentences and for broader criminal justice reform.<sup>77</sup> Women petitioned to redress private grievances and joined men in petitioning on matters of broader public concern.<sup>78</sup> While less common, colonial governments also saw petitions from slaves and free African Americans.

In one poignant example, the Virginia legislature heard, considered, and granted a petition by “[a] group of mulattoes and free blacks” to exempt their wives and daughters from a tax imposed on black women and not white women.<sup>79</sup> In 1769, the Colony of Virginia collected a “head tax,” or a flat tax, from all residents.<sup>80</sup> The tax applied to all men, both white and black.<sup>81</sup> But the tax applied only to black women, meaning that white women did not have to pay the tax.<sup>82</sup> A group of mixed-race and free blacks took issue with the tax on black women and decided to exercise their right to petition.<sup>83</sup> As surprising as it may sound to our modern ears, the Virginia Assembly treated the petition as it did all others.<sup>84</sup> The document became part of the formal record of the legislature.<sup>85</sup> Following formal consideration and review, “both houses of the assembly and the governor agreed that the request was reasonable” and they passed a law exempting black women from the tax.<sup>86</sup> Native Americans petitioned also, often including explicit reference to their tribal identity, most commonly to redress concerns over tribal land claims.<sup>87</sup>

That the Articles of Confederation mentioned petitioning only in the context of the rights of states should come as little surprise given the limited jurisdiction and structure of the federal government under the Articles.<sup>88</sup> The newly formed state constitutions, however, were quick to include the right.<sup>89</sup> Pennsylvania, with its long history of participatory politics, and Vermont

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76. Smith, *supra* note 34, at 1170-72.

77. Mark, *supra* note 34, at 2181-82.

78. BAILEY, *supra* note 75, at 44.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 45.

85. *Id.* at 44.

86. *Id.*

87. See, e.g., Daniel Carpenter, *Indigenous Representation by Petition: Transformations in Iroquois Complaint and Request, 1680-1760*, at 14-15 (Feb. 2015) (unpublished manuscript) (on file with author).

88. ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 2-3.

89. Mark, *supra* note 34, at 2199-2203.

bestowed a broad right to petition on all “people” within the state.<sup>90</sup> As they did in Parliament, petitions drove the legislative agenda of the colonial and state governments.<sup>91</sup> Volunteer farmers and other part-time support staffed these nascent governing bodies, and the petitions offered a steady stream of welcome information.<sup>92</sup> Given the ubiquity of the practice in eighteenth-century America, it was taken for granted that the U.S. Constitution would include the right to petition in its later-added Bill of Rights.

#### B. Contextualizing the Text

Unlike other rights delineated by the Bill of Rights, the Petition Clause generated very little debate during drafting and ratification. Some have ascribed this omission to the petition process’s being so ubiquitous and so mundane in the colonies by the time of the Founding that capturing the right required little discussion—most state constitutions had included the right as a matter of course, and the petition process and the purpose that it served were largely taken for granted. The most substantive discussion of the right to petition came in response to an effort to amend what would become the First Amendment to include a more restrictive right—the right to instruct representatives. It was through the rejection of this more restrictive right that the Framers left us with a record of their interpretation of the right to petition.

The process of “instructing” representatives was what many at the Founding, but especially the Federalists, viewed as an anachronistic mechanism afforded the state governments in the Confederation Congress. Unlike petitions, instructions emanated from majorities and official institutions only. In the Confederation Congress, instruction allowed state governments, constituted by a majority, to bind a lawmaker to a particular course of action.<sup>93</sup> If a lawmaker failed to abide by the instructions that directed him, he risked recall back to his state and loss of salary.<sup>94</sup> The mechanism of instruction in the Confederation Congress was itself a carryover from the colonial governments and had been used increasingly in the colonies as the primary means of political

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90. *Id.* at 2201-02.

91. See Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1463 (1998); Alison G. Olson, *Eighteenth-Century Legislatures and Their Constituents*, 79 J. AM. HIST. 543, 556-57 (1992); Alan Tully, *Constituent-Representative Relationships in Early America: The Case of Pre-Revolutionary Pennsylvania*, 11 CAN. J. HIST. 139, 143-45 (1976).

92. Higginson, *supra* note 34, at 153.

93. See John P. Kaminski, *From Impotence to Omnipotence: The Debate over Structuring Congress Under the New Federal Constitution of 1787*, in HOUSE AND SENATE, *supra* note 21, at 1, 25-26.

94. *Id.*

engagement.<sup>95</sup> Instructions embodied a rejection of the British conception of “virtual representation”—the notion that each member of Parliament represented the whole people and not the particular locality that elected him.<sup>96</sup>

It was via virtual representation, Britain argued, that the colonies were represented in the House of Commons despite not possessing the franchise.<sup>97</sup> The colonies rejected virtual representation for what they termed “actual representation” by colonial governments and moved from petitioning to instructing their assemblies to declare independence from Britain.<sup>98</sup> As Gordon Wood described it,

[T]he petitioning and the instructing of representatives were rapidly becoming symbols of two quite different attitudes toward representation . . . . Petitioning implied that the representative was a superior so completely possessed of the full authority of all the people that he must be solicited, never commanded, by his particular electors . . . . Instructing, on the other hand, implied that the delegate represented no one but the people who elected him and that he was simply a mistrusted agent of his electors, bound to follow their directions.<sup>99</sup>

Modern legislation scholarship refers to these two models of representation by the roughly analogous contemporary theories of trustee and agency, respectively.<sup>100</sup>

Despite early enthusiasm for actual representation around the time of the Revolution, support of instructing as the ideal means of engaging with government outside of the vote would soon wane.<sup>101</sup> Relying heavily on instructions had its costs, and governance in the colonies grew more decentralized and more fractured.<sup>102</sup> Localities leaned heavily on instructions in binding general governments to the needs of their constituencies and, given the inevitable blurring between local and general issues, instructions contributed to converting the public into an “infinite number of jarring, disunited factions.”<sup>103</sup> As Wood observed, the era preceding the Founding saw a similar decline in the version of republicanism reliant on virtue and on

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95. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 189-90 (1969).

96. *Id.*

97. *Id.* at 176.

98. *Id.* at 189.

99. *Id.*

100. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 123-24 (1995).

101. WOOD, *supra* note 95, at 195-96; *see also id.* at 606-15 (describing the transition in American’s conception of politics from an expectation of virtuous homogeneity to an acknowledgement of diverse pluralism).

102. *Id.* at 192-93.

103. *Id.* at 192.

transcendence of self-interest in the domain of lawmaking.<sup>104</sup> With the factions wrought by actual representation, instructions, and other structures of direct democracy, the Founding generation witnessed first-hand the realities of human nature on which they had to construct the American republic.

Madison framed this paradigm shift from American homogeneity and virtuous republican exceptionalism to the realities of pluralist politics in poetic terms in *The Federalist No. 10*: “Liberty is to faction, what air is to fire, an aliment without which it instantly expires.”<sup>105</sup> Rather than force human nature into the Aristotelian virtue ethics required by antiquated republican forms of government, the constitutional experiment of 1787 would recognize the intrinsic nature of factions and the expansive range of the public good in order to design around these democratic “defects.”<sup>106</sup> As Madison theorized in *The Federalist No. 10*, America could not plausibly vanquish liberty, nor could it enforce or expect a homogeneous vision of the good, and it was under these conditions that factions flourish.<sup>107</sup> The aim of government was not to control the causes of faction; in Madison’s view, the aim of government was instead to control the effects of faction and to construct mechanisms to prevent competing visions of the good from debilitating the newly formed national government. The Framing generation would realize this goal through what Madison termed the “republican principle,” or the scheme of representative government.<sup>108</sup> Through representative democracy, rather than a “pure” or direct democracy, government would control faction by passing public views “through the medium of a chosen body of citizens.”<sup>109</sup> By passing the public will through the filter of republican government, in Madison’s vision, “it may well happen that the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves.”<sup>110</sup> So it was that the Framing generation reflected on the failures of actual representation and, in rejecting the latter, embraced a new form of republicanism that rejected instructions.

The debate over whether representation in the new Congress should subscribe to the theory of representation aligned with instructions or one aligned with petitioning surfaced in the House of Representatives debates around drafting what would become the First Amendment. On Saturday, August 15, 1789, following debate over other proposed amendments, the House considered the text of the nascent Petition Clause: “The freedom of speech and

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104. See *id.* at 195.

105. THE FEDERALIST NO. 10, at 44 (James Madison) (Clinton Rossiter ed., 1961).

106. See *id.* at 44-46.

107. *Id.* at 44-45.

108. *Id.* at 45, 47-48.

109. *Id.* at 46-47.

110. *Id.* at 47.

of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.”<sup>111</sup> Theodore Sedgwick of Massachusetts spoke first and, finding the right to assemble—the necessary predicate to speaking in an era of low-tech communications—redundant to the right of speech, moved to strike the phrase “assemble and.”<sup>112</sup> If the Constitution was to include such an obvious and duplicative right, Sedgwick declared, it must also declare “that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper.”<sup>113</sup>

Striking out “assemble and” concerned Thomas Tudor Tucker of South Carolina because the phrase had been recommended by the states of Virginia and North Carolina.<sup>114</sup> The recommendations of these particular southern states, Tucker lamented, had been largely neglected. He noted that the proposed amendment omitted Virginia and North Carolina’s most “material” proposal: the right to instruct their representatives.<sup>115</sup> In light of the fact that Virginia and North Carolina might soon lose ground on the right to assemble, Tucker stated his intention to move to include the right of instruction following resolution of the motion to strike the right to assemble.<sup>116</sup>

As the text of the Constitution reveals, the right to assemble survived the motion. The House then refocused its institutional attention on Tucker’s amendment, which would prove far more contentious than omission of the mere “surplusage” that was the right to assemble. At the very moment Tucker moved to insert the words “to instruct their Representatives,” Thomas Hartley of Pennsylvania exclaimed aloud that he “wished the motion had not been made.”<sup>117</sup> Hartley’s concern was that the proposal had reinvigorated the longstanding debate over actual and virtual representation embodied in the distinct recognition of petitioning rather than instructions.<sup>118</sup> Representation in Congress, according to Hartley, required that the people have trust in their representatives to govern independently. The principle of representation was “distinct from an agency, which may require written instructions.”<sup>119</sup>

A majority of the House shared Hartley’s concerns with instructions as a “dangerous doctrine, subversive of the great end for which the United States have confederated,” which could prove “utterly destructive of all ideas of an

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111. 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1089 (Bernard Schwartz ed., 1971).

112. *Id.* at 1089-90.

113. *Id.* at 1090.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1091.

118. *Id.* at 1091-92.

119. *Id.* at 1092.

independent and deliberative body.”<sup>120</sup> By allowing the right to instruct, “the Government would be altered from a representative one to a democracy, wherein all laws are made immediately by the voice of the people.”<sup>121</sup> Such a right might leave the legislature open to capture by the “passions” of people, echoing Madison’s term for faction.<sup>122</sup> The new legislature was expected to do more than simply reflect the public will. The Constitution would instead include a variety of checks on representation elsewhere—bicameralism for example—that would foster structured deliberation and an ordered lawmaking process in Congress.<sup>123</sup> In order to prevent disruption of these mechanisms, the “right of the people to consult for the common good can go no further than to petition the Legislature, or apply for a redress of grievances.”<sup>124</sup>

Elbridge Gerry of Massachusetts espoused the minority view that the right to instruct was a necessary additional check on the inevitable maladministration of government.<sup>125</sup> Gerry interjected that instruction would no more foster faction in the House than would deliberation.<sup>126</sup> Moreover, the right to instruct was a fundamental component of sovereignty, according to Gerry, and to fail to recognize the right to instruct would cause the people to relinquish the sovereignty vested in them elsewhere in the Constitution.<sup>127</sup> But Gerry couched his support for instructions on the theory that the instructions would serve to advise only and would not bind representatives to the will of constituent majorities.<sup>128</sup> He also balked at the criticism of the majority that instructions would serve to convert the new national government into a democracy.<sup>129</sup> Holding himself as among the Anti-Federalists, Gerry wholly expected the new government to be a democracy, just not a direct democracy.<sup>130</sup> John Page of Virginia shared this view as well, seeing representative democracy as a necessary evil to resolve problems of scale and geography—were it possible for all to cast a vote, in Page’s view the government must allow it.<sup>131</sup>

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120. *Id.* at 1093, 1105.

121. *Id.* at 1097.

122. *See, e.g.,* THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 43-44.

123. 2 THE BILL OF RIGHTS, *supra* note 111, at 1094.

124. *Id.*

125. *Id.* at 1094-96.

126. *Id.* at 1095.

127. *Id.*

128. *Id.*

129. *See id.* at 1095-96.

130. *See id.*

131. *Id.* at 1101-02.

The majority view prevailed, declining the proposed amendment and rejecting the right to instruction by a vote of forty-one to ten.<sup>132</sup> In the majority view, it was petitioning that ought to form the limiting principle on how the public could engage in the lawmaking process outside of the vote, in order to maintain republican principles and those mechanisms of representation carefully designed and detailed elsewhere in the Constitution. To provide the right to instruct was to require members to be bound by those instructions, thereby disrupting the deliberative and independent lawmaking process envisioned by Article I. The right to petition, by contrast, very clearly did not bind, yet it afforded the public a formal and transparent channel by which the public could “declare their sentiment . . . to the whole body.”<sup>133</sup>

While the legislative history might convey the Founders’ personal views in framing the Petition Clause, there is little better evidence of the public’s understanding of the Petition Clause than the Framing generation’s exercise of the right before and after ratification—it wasted no time in doing so. Amidst the debates in the House and Senate over the proposed amendments, including the Petition Clause, Congress was affording equal, formal, and public process to petitioners. Historians have documented over six hundred petitions to the First Congress.<sup>134</sup> Notably, petitioners of the First Congress did not limit themselves to matters of private concern. To provide a few examples, petitions conveyed grievances pertaining to a range of matters, including regulation of commerce, the need for public credit, the institution of slavery, requests for intellectual property protection, disposition of public lands, public employment and elections, the location of postal offices and federal courts, and the settlement of war debts and pensions.<sup>135</sup> Congress most often referred these petitions to the executive or to a congressional committee for review and routinely provided each a formal response.<sup>136</sup> Not infrequently, petitions included argument, charts, maps, and proposed statutory language.<sup>137</sup>

The unenfranchised, including one Mary Katherine Goddard of Maryland, also petitioned the First Congress on their own behalf.<sup>138</sup> Goddard had recently

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132. *Id.* at 1105.

133. *Id.* at 1096.

134. William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *HOUSE AND SENATE*, *supra* note 21, at 29, 31.

135. *Id.* at 31-56.

136. See STAMM OF H. COMM. ON ENERGY & COMMERCE, 99TH CONG., PETITIONS, MEMORIALS AND OTHER DOCUMENTS SUBMITTED FOR THE CONSIDERATION OF CONGRESS, MARCH 7, 1789 TO DECEMBER 14, 1795, at 361 (Comm. Print 1986).

137. diGiacomantonio, *supra* note 134, at 46; see also Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 30-31 (2011).

138. 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 232-33 (Kenneth R. Bowling et al. eds., 1998) [hereinafter DOCUMENTARY HISTORY].

been dismissed as postmistress for the city of Baltimore after serving in the position for over fourteen years and petitioned Congress to challenge the dismissal.<sup>139</sup> Goddard argued that at the time, the Washington Administration mandated that only “manifest misconduct” would establish a basis for dismissal from public office.<sup>140</sup> It was unclear whether Goddard’s dismissal was due to gender—her replacement appointee was male—or her close association with the Anti-Federalists through her brother, William.<sup>141</sup> In addition to contacting President Washington directly, Goddard submitted Washington’s executive order, along with her petition signed by two hundred Baltimore businessmen, to the Senate for consideration.<sup>142</sup> The Senate read her petition but declined to act in her favor.<sup>143</sup> Again, it was unclear whether the refusal was driven by discrimination or politics, but the petition was accepted like all others.<sup>144</sup> The petitions of the unenfranchised also included the petition of Jehoiakim McToksins, citizen of the Stockbridge, or Moheconnuck, Nation, who petitioned for compensation due to him for serving as an interpreter for the United States in the war for independence.<sup>145</sup> Presented by the representative for Massachusetts, who also collected affidavits on McToksins’s behalf, the petition was successful, and Congress granted McToksins his unpaid salary and forgave his missing documentation.<sup>146</sup>

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139. Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, in *HOUSE AND SENATE*, *supra* note 21, at 100, 109-10.

140. *Id.* at 110.

141. *Id.* at 111.

142. 8 DOCUMENTARY HISTORY, *supra* note 138, at 231-33.

143. John & Young, *supra* note 139, at 114.

144. *Id.*

145. diGiacomantonio, *supra* note 134, at 52; *see also* H.R. JOURNAL, 1st. Cong., 1st Sess. 804 (1789) (noting a resolution “directing the payment of \$120” to McToksins).

146. diGiacomantonio, *supra* note 134, at 52. Absent from this history of petitioning is discussion of the so-called “gag rules,” a series of resolutions passed by the House during the 1830s and 1840s to limit consideration of petitions on the subject of slavery. *See* Higginson, *supra* note 34, at 158-65. Omission of this later history of petitioning is not inadvertent. Rather, it is pragmatic. The secondary sources describing nineteenth-century petitioning lend primacy to assorted debates around the gag rules largely based on the false premise that the gag rules caused the end of petitioning in Congress. *Id.* at 143 (“Although sheer volume of business eventually might have severed the duty of assembly consideration from First Amendment petitioning, this result was guaranteed when petitioning became enmeshed in the slavery controversy.” (footnote omitted)); Lawson & Seidman, *supra* note 34, at 751 (“The so-called gag rule, which prohibited receipt of petitions concerning slavery, brought this era of petitioning to an end.”). More recent scholarship has discredited this earlier theory, most notably a thorough treatment of the question by legal historian Tabatha Abu El-Haj in her pathbreaking work on nineteenth-century state and local political participation outside of the vote. *See* Abu El-Haj, *supra* note 137, at 28-35. A comprehensive treatment of nineteenth and twentieth-century congressional petitioning has yet to be written, however. I aim to address this notable absence in future projects.



C. Contextualizing Lobbying

A comprehensive history of lobbying, charting its course across the development of the American republic, has yet to be written. To the extent that the historiography of American politics references lobbying at all, historians have largely cabined their study to particular eras, interest groups, and legislative vehicles.<sup>147</sup> Aside from the descriptive work of public choice theory, lobbying has been largely absent from political theory and political ethics. Political scientists have created out of whole cloth the assumption that “[l]obbying is probably as old as government,” with little development of the basis for that assumption.<sup>148</sup> Even the origin of the term “lobbying” remains in dispute.<sup>149</sup> It is as if the amorphous nature of lobbying has seeped into the very scholarship that surrounds it.

Despite the invisibility of what some refer to as the “fourth branch” of government, the few Early Americanists to focus on lobbying describe the practice as wholly distinct from petitioning.<sup>150</sup> Political historian Jeffrey Pasley describes lobbying as “the personal buttonholing of lawmakers by paid agents of special interests,” and earlier historical work of the period found little evidence of our modern lobbying system in the First Congress.<sup>151</sup> Much of the pressure from interested groups during this period took the form of petitions, private letters, and engagement with the press.<sup>152</sup> While pressure groups engaged in all of these tactics, the petition process constituted the primary means by which individuals and loose associations engaged in the lawmaking process.<sup>153</sup> Pasley speculates that the absence of the comprehensive lobbying scheme we have today was due, at least in part, to the efficient functioning of petitioning.<sup>154</sup> But, in contrast to earlier inquiry, Pasley’s review of the historical documents of the First Congress revealed “abundant evidence” of a different kind of lobbying, one of subtler and more limited form.<sup>155</sup>

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147. See Pasley, *supra* note 21, at 57-58.

148. LESTER W. MILBRATH, *THE WASHINGTON LOBBYISTS* 12 (1963).

149. Compare Pasley, *supra* note 21, at 72 (tracing the term back to before 1808 as a way to describe “upper-crust” citizens congregating in the antechambers of Congress), with ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* 149-50 (2014) (tracing the term back to “the beginning of the nineteenth century as paid influencers started to hang around the lobbies of legislative buildings and hotels”).

150. Pasley, *supra* note 21, at 58-59.

151. *Id.* at 59.

152. See *id.* at 58.

153. See *id.* at 60.

154. *Id.*

155. *Id.* at 61.

Pasley describes this subtle and limited form of early lobbying as an outgrowth of petitioning.<sup>156</sup> It was common practice at the Founding to hire lawyers to draft and deliver petitions on behalf of petitioners.<sup>157</sup> The petition process included a range of formalities, and attorneys could prove helpful in navigating those formalities by drafting and presenting the documents.<sup>158</sup> Lawyers largely stayed away from broader policy petitions, however, mainly focusing their representation on petitions with individualized grievances.<sup>159</sup> Convinced that it might increase their chances of favorable consideration, some petitioners began to hire agents not only to draft and present their petitions but also to contact members personally and monitor the consideration process.<sup>160</sup> While most petitioners or their agents delivered the petition and then left the capital, many began to stay and to put up extended residence around the seat of national government.<sup>161</sup> Less politically connected and distinguished agents frequented the hallways of Congress, as well as local taverns, in the hopes of catching a member for casual conversation.<sup>162</sup> Pasley traces an early usage of the term “lobby” to describe loiterers in the antechambers of Congress, where interested parties would congregate in hopes that they might catch a moment with a member.<sup>163</sup> While there was extensive evidence of loitering in lobbies and bars,<sup>164</sup> there is little evidence that such loitering was ever actually successful.

One of the first comprehensive lobbying campaigns was waged by the Quakers, a community that still prides itself today on its vigorous legislative advocacy.<sup>165</sup> The Quakers coupled their attempts to petition the First Congress to abolish slavery with an impressive lobbying campaign that included “looming” over the galleys, loitering in the lobbies to approach members as they left formal proceedings, visiting members’ temporary capital lodgings, and inviting members of Congress to discuss the issue over meals.<sup>166</sup> Not surprisingly, the Quakers’ aggressive methods cultivated an incredible hostility by members against any and all forms of lobbying.<sup>167</sup> The Quakers’ conduct

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156. *Id.* at 61-62.

157. *Id.* at 62.

158. *See id.*

159. *Id.*

160. *See id.* at 64-65.

161. *Id.*

162. *See id.* at 63-64.

163. *Id.* at 72.

164. *Id.* at 64, 77.

165. *See, e.g., History of FCNL*, FRIENDS COMM. ON NAT’L LEGIS. (Oct. 21, 2010), <http://fcn.org/about/history/chronology>.

166. Pasley, *supra* note 21, at 64-65.

167. *See id.* at 65.

was unprecedented. Very few organized interests existed in the capital at that time, and none circumvented the petition process in ways similar to the Quakers.<sup>168</sup> Following the campaign, “Congress took steps to prevent a repeat of the episode.”<sup>169</sup>

The rise of our modern, ubiquitous lobbying culture did not occur until the mid- to late-nineteenth century.<sup>170</sup> Some ascribe its development to growing dysfunction within the petition process and petitioning’s slow decline.<sup>171</sup> Consideration of petitions became less formalized and Congress implemented a series of rules that provided petitions less prominence on the legislative agenda.<sup>172</sup> While Congress undermined the petition process by a thousand procedural cuts, lobbying flourished, as did the reality that the ability to have a voice during the lawmaking process required hiring a lobbyist to speak on your behalf.<sup>173</sup> With the rise of lobbying came the use of ever more creative practices of influencing the lawmaking process, including bribery and other more nefarious means.<sup>174</sup> Public proclamations of hatred for the profession soon followed.<sup>175</sup> Eventually, likely some time during the Progressive Era, lobbying wholly supplanted petitioning as the primary means of public engagement with the lawmaking process outside of the vote.<sup>176</sup>

## II. The “Decontextualized” Petition Clause

### A. Our Lobbying Regulatory Framework

There are few today who would defend our current lobbying system on consequentialist grounds.<sup>177</sup> Many, if not most, Americans hold lobbyists in

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168. *Id.* at 65-66.

169. *Id.* at 66 (quoting 8 DOCUMENTARY HISTORY, *supra* note 138, at 314).

170. *Id.* at 60-61.

171. *See id.*

172. *See* Higginson, *supra* note 34, at 159-65 (describing the gag rule debates in depth); Benjamin Schneer, Representation Replaced: How Congressional Petitions Substitute for Direct Elections 13 (Sept. 12, 2014) (unpublished manuscript), [https://www.dropbox.com/s/ox9rwuo0cy7h3w6/ben\\_schneer\\_jmp.pdf?dl=0](https://www.dropbox.com/s/ox9rwuo0cy7h3w6/ben_schneer_jmp.pdf?dl=0). *But see* Abu El-Haj, *supra* note 137, at 32-35 (describing the impact of the gag rule as “overstate[d]”).

173. Pasley, *supra* note 21, at 61.

174. *Id.*

175. *Id.*

176. *See* Schneer, *supra* note 172, at 13-14. Because scholars are just beginning to speculate as to these questions, the exact timing and causes of the formal petitioning process’s demise in Congress are as of yet unknown. My future work in this area will begin to address these questions.

177. Although few would defend our current lobbying system on consequentialist grounds, one stalwart body of scholarship suggesting such a defense remains. According to some public choice theorists, our lobbying system and preferential treatment of the

incredibly low regard,<sup>178</sup> lobbying is often referred to as “legalized bribery,”<sup>179</sup> and the overwhelming majority of Americans believe that lobbyists routinely

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politically powerful could result in efficient policy outcomes. Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373 (1983); cf. KEVIN M. ESTERLING, *THE POLITICAL ECONOMY OF EXPERTISE: INFORMATION AND EFFICIENCY IN AMERICAN NATIONAL POLITICS* 1-2 (2004) (“[S]ociety should prefer to be governed by expert-informed rather than ill-informed policies because the former are often more effective and efficient in reaching social goals. . . . Unlike policy experts, ordinary citizens often have at best a rudimentary or incomplete understanding . . . [of the information] underlying an expert policy idea or proposal.”). Becker’s model responded to a growing disapproval among public choice scholars over the preferential treatment of politically powerful special interest groups and a concern that preferential treatment of these groups would result in an inefficient expression of majority preference. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 34 (1991); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 31-32, 52 (1965) (modeling group behavior and concluding that “small groups will further their common interests better than large groups”).

The answer to Becker’s empirical claim that our current lobbying system results in an efficient expression of majority preference is that it is irrelevant here, where the petition right protects the procedural rights of minorities regardless of legislative outcomes. As Einer Elhauge argued persuasively, public choice theory necessarily rests on an exogenous “normative baseline,” and most public choice scholarship assumes, without support, that the correct normative baseline is majoritarianism. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49-50 (1991); see also LARS UDEHN, *THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS* 10 (1996) (offering a sociological critique of the economic theory of politics and describing the distinctions between positive and normative public choice theory).

A contextualized understanding of the petition right offers an alternative normative baseline for evaluating the lawmaking process—the equality of access and procedure baseline supported by the right to petition—and provides grounds to reject the majoritarian baseline assumed by public choice theory. Through the petition process, Congress attended to and passed laws in favor of minorities and individuals, even, at times, in contravention of the will of the majority. The requests of “specific interest” groups were not only encouraged, they were officially sanctioned, regardless of their comportment with majority preference. See Elhauge, *supra*, at 50.

178. In the first year that Gallup included lobbyists on its “honesty and ethics list,” lobbyists debuted at the very bottom, immediately below automobile salesmen. Jeffrey M. Jones, *Lobbyists Debut at Bottom of Honesty and Ethics List*, GALLUP (Dec. 10, 2007), <http://www.gallup.com/poll/103123/lobbyists-debut-bottom-honesty-ethics-list.aspx>. In a different poll, respondents reported overwhelmingly, at 71%, that lobbyists held too much power. Lydia Saad, *Americans Decry Power of Lobbyists, Corporations, Banks, Feds*, GALLUP (Apr. 11, 2011), <http://www.gallup.com/poll/147026/americans-decry-power-lobbyists-corporations-banks-feds.aspx>. A 2006 poll, around the time of the Abramoff scandal, had 77% of respondents agreeing that lobbyists bribing members of Congress is just “[t]he way things work in Congress.” CBS News & N.Y. Times, *Congress, the Abramoff Scandals, and the Alito Nomination* 1 (2006), [http://www.cbsnews.com/htdocs/CBSNews\\_polls/JANB-CON.PDF](http://www.cbsnews.com/htdocs/CBSNews_polls/JANB-CON.PDF).

179. Jeffrey Birnbaum, *The End of Legal Bribery*, WASH. MONTHLY (June 2006), <http://www.washingtonmonthly.com/features/2006/0606.birnbaum.html>.

bribe members of Congress.<sup>180</sup> Many decry lobbying as rent seeking and a corruption of the democratic process.<sup>181</sup> Despite near-unanimous consensus that more must be done to regulate lobbying, Congress has enacted only minimal and ineffective regulation in the face of lobbying scandals and growing public concern. Some scholars, offering a more charitable interpretation, have speculated that the discordant views of lobbying as both criminal and constitutionally protected have evolved over time, resulting in a jumbled patchwork of lobbying laws.<sup>182</sup> Other scholars, more cynical of the political process, see the corrupt handiwork of lobbyists themselves in failures to regulate lobbying.<sup>183</sup> Although public opinion seems quite settled about the problem, Congress continues to raise concerns that any solution would violate the Petition Clause. A close examination of the legislative histories of these attempted reforms reveals that our inability to regulate lobbying is based, it seems, on constitutional and not consequentialist or nefarious grounds.

Our often-criticized modern lobbying regulatory framework—namely light-touch registration and disclosure regimes—has its origins in our ongoing inability to reconcile lobbying with the Petition Clause. The legislative history of this scheme provides an illustrative example of the underlying tensions inherent in our efforts to regulate lobbying.

On April 4, 1935, then-Senator Hugo Lafayette Black of Alabama introduced Bill 2512, titled “[t]o define lobbyists, to require registration of lobbyists, and provide regulation thereof,” into the Senate.<sup>184</sup> The main content of that bill will feel familiar to anyone versed in our modern lobbying regulation: it offered a registration requirement, a periodic disclosure regime, and penalties for noncompliance. Black’s bill defined lobbying broadly, regulating not only *direct* contact with legislatures but also *indirect* efforts to influence legislation with advocacy campaigns aimed at the public. It defined “lobbying” as an effort to influence any political branch, legislative and executive, by any means possible—including direct means, like petitioning and appearing before committees, as well as indirect means, like publishing books or magazines.<sup>185</sup> Next, the bill outlined a registration and disclosure scheme that would require all who engaged in “lobbying” for compensation to register with the Clerk of the House of Representatives and the Secretary of the Senate

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180. *Americans Taking Abramoff, Alito, and Domestic Spying in Stride*, PEW RES. CTR. (Jan. 11, 2006), <http://pewrsr.ch/X0KeSB> (finding that 81% of Americans believed that lobbyists bribing members of Congress was “common behavior”).

181. See, e.g., Hasen, *supra* note 3, at 197–98.

182. See Briffault, *supra* note 3, at 193.

183. See William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, in *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* 5, 8 (William V. Luneburg et al. eds., 4th ed. 2009).

184. S. 2512, 74th Cong. (1935).

185. *Id.* § 1.

before engaging in any lobbying activity.<sup>186</sup> The bill then required the registrant to file monthly disclosure reports thereafter that included all income received, names of individuals lobbied, and names of all publications authored by the lobbyist.<sup>187</sup> Failure to comply with the registration and disclosure regimes carried a penalty of \$5000, criminal sanctions of not more than twelve months in prison, or both.<sup>188</sup>

By the time that Senator Black drafted his bill, the formal petition process had fallen into disuse and the primary means of engagement with Congress was through informal mass mobilization tactics.<sup>189</sup> The structure of the bill captured Senator Black's view that petitioning encompassed the broad and informal practice of public-directed advocacy and mass mobilization of his day, including not only direct engagement with legislators but also the act of advocating for or against legislation in the public sphere. According to Black, this broad right to petition was sacrosanct, and regulation aimed at "lobbying" was an effort to expose abuse of the petition process in order to preserve the right to petition. Senator Black did not believe that the Constitution protected the right to "lobby," a term that to Black encompassed only "bad lobbying" or abuse of the petition process. When it came to lobbying, the Senator did not mince words:

There is no constitutional right to lobby. There is no right on the part of any greedy or predatory interest to use money taken from the pockets of the citizen to mislead him and thus enlist his aid in enabling the same greedy and predatory interest to take still more money out of the pocket of the same unsuspecting citizen. There is no constitutional right on the part of any sordid and powerful group to present its views behind a mask concealing the identity of the group. These money-maddened men behind the mask have no right to send their hired men out into the streets, into the places of business, into the homes and into the churches, to persuade or frighten citizens into giving blanket authority to have their names signed to telegrams and letters, to be later manufactured by high-powered, high-priced publicity agents, and sent at company expense to the citizens' representatives in Washington, in such way and manner as to deliberately deceive those representatives.<sup>190</sup>

At the time Senator Black introduced his bill, no regulatory scheme governed lobbyists at the federal level. After the first thorough congressional investigation of lobbying activities in 1913 and a few scandals that followed, members began introducing a variety of bills, only to have them die in

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186. *Id.* § 4.

187. *Id.* § 5.

188. *Id.* § 7.

189. See Abu El-Haj, *supra* note 137, at 34-35; Eskridge, *supra* note 183, at 8; Schneer, *supra* note 172, at 13.

190. Senator Hugo L. Black, Lobby Investigation, Address on NBC (Aug. 8, 1935), in 1 VITAL SPEECHES OF THE DAY 762, 762 (1935).

committee.<sup>191</sup> Black's bill was similarly responsive to scandal: in 1935, the year that Black introduced his bill, Congress was fighting to pass the Public Utility Holding Company Act, commonly known as the Wheeler-Rayburn Bill.<sup>192</sup> The Wheeler-Rayburn bill was typical of the "trust-busting" legislation common to the New Deal era, and it proposed bringing private utilities under government oversight for the first time.<sup>193</sup> The utility companies were not going to take the new restrictions lying down and mounted one of the fiercest antilegislation campaigns that Congress had seen.<sup>194</sup> Most notably, the utility companies flooded Congress with over 250,000 telegrams opposing the bill, all of them paid for by the utilities and most with signatures forged by utility employees.<sup>195</sup> Controversy surrounding the campaign fueled both a new Senate investigatory committee, focused on "lobbying," chaired by Senator Black and also a bill that he authored.<sup>196</sup>

Like all of the earlier reform efforts, Black's bill also stalled. Following an amendment to expand the disclosure period to three months and to broaden the definition of lobbyist to anyone who, for pay, attempted "to influence legislation, or to prevent legislation," the Black bill quickly passed the Senate.<sup>197</sup> However, it faced strong opposition in the House. William Eskridge, subscribing to the cynical view, has speculated that the bill's failure was a result of a Senate bill dying in a lobbyist-controlled House.<sup>198</sup> But the legislative history reveals a more nuanced story, grounded in a fundamental disagreement over the right to petition and the relationship between petitioning and lobbying.

The legislative history reveals that the House Judiciary Committee stalled Black's bill in order to make way for a draft of its own.<sup>199</sup> Like Black, the House Committee believed that the right to petition was sacrosanct and encompassed the mass mobilization politics of the day. But the House Committee saw no daylight between Black's distinction of petitioning and lobbying, because the actual regulated conduct of "influencing or preventing legislation" looked identical. By that time, there were no longer clear rules to govern petitioning

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191. Eskridge, *supra* note 183, at 8.

192. *Id.*; see also Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005).

193. Eskridge, *supra* note 183, at 8.

194. See *id.*

195. *Id.*

196. *Registration and Regulation of Lobbyists: Hearing on S. 2512 Before a Subcomm. of the S. Comm. on the Judiciary*, 74th Cong. 1-2 (1935).

197. 79 CONG. REC. 8305-06 (1935).

198. Eskridge, *supra* note 183, at 8.

199. See H.R. REP. NO. 74-2214, at 1-3 (1936) (introducing the House Judiciary Committee's own bill in 1936 to encourage "a reasonable and proper regulation of lobbying activities").

and therefore abuse of that process, what Black called “lobbying,” was impossible to identify. Therefore, the House saw any forced registration or disclosure regime focused on legislative advocacy efforts, good or bad, as necessarily an infringement of that sacrosanct petitioning right.<sup>200</sup> The House Committee would allow some infringement of the right to petition because of the need to balance that right against the informational interest of lawmakers. But that infringement must be narrowly tailored.<sup>201</sup>

The bill was then referred to conference in order to reconcile the House and Senate drafts.<sup>202</sup> The conference committee reported out a broad bill, expanding the registration regime to include lobbyists who target the executive and expanding the disclosure regime to require monthly disclosure reports. The broad conference bill met its expected fate in the House and was defeated in a floor vote by a three-to-one margin. In the debates that preceded the defeat, House members expressed concern that the broad bill regulated beyond the recent “bad lobbyists,” the utility companies, and would burden “good” groups who petitioned, such as “all farm organizations, all patriotic organizations, all women’s clubs, all peace societies.”<sup>203</sup> These floor debates reveal that Black had argued convincingly for a normative distinction between “good” petitioning and “bad” lobbying and that bad lobbyists, like the utilities, had no petition rights to infringe. But House members struggled with the fact that the conduct that constituted “petitioning” and “lobbying” looked identical. Aside from penalizing those “bad lobbyists” directly, House members were not convinced that there existed a way to regulate unprotected bad lobbying without also regulating petitioning.<sup>204</sup>

It wasn’t until ten years later, after Black’s appointment to the Supreme Court, that the text of the Black bill was revived, dusted off, and finally muscled through both chambers on the coattails of comprehensive legislative reform. Following World War II, the concern over associational lobbying intensified, and in March of 1946, Congress established yet another special committee—the Special Joint Committee on the Organization of Congress—to investigate “any or all groups which have or are engaged in the present propaganda campaign or lobby to defeat legislative measures for the relief of the acute housing shortage . . . to abolish or weaken price control; [and] all

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200. *See id.*

201. *See id.* at 1-2 (describing lobbying as protected by the right to petition and then balancing that right against the informational interests of lawmakers, resulting in a narrowed bill).

202. 80 CONG. REC. 9430 (1936).

203. *Id.* at 9747.

204. *Cf.* H.R. REP. NO. 74-2925, at 1, 5-6 (1936) (documenting disagreements between the House and the Senate about who should be regulated).



groups which have or are engaged in the power lobby.”<sup>205</sup> Five hurried months later, President Truman signed into law the Legislative Reorganization Act, Title III of which included the Federal Regulation of Lobbying Act.<sup>206</sup> The scheme closely tracked the language of the 1936 conference committee bill and then-Senator Black’s bill, which had provided a basis for the committee bill.<sup>207</sup> The legislative history reveals little attention to lobbying and confusion in the floor debates over the effect of the legislation and its relationship with the right to petition.<sup>208</sup> Despite the confusion and lack of deliberation, the momentum of the larger legislative reform bill would push the Lobbying Act through. Although widely criticized as toothless and ineffective,<sup>209</sup> Black’s regime of registration and disclosure has served as the basis for all lobbying regulation since 1946, replaced only by statutes that have adopted the same registration and disclosure framework while strengthening requirements around the edges.

#### B. Our Muddled Petition Clause Doctrine

A similar definitional muddle pervades our Petition Clause jurisprudence. The First Amendment provides that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>210</sup> Huddled at the end of this famous amendment is the nearly forgotten Petition Clause. By comparison to other First Amendment protections, the Supreme Court has only rarely turned its attention to this particular piece of text. On those rare occasions where it has, the Court has adopted a form of simple textualism uncommon to its First Amendment jurisprudence<sup>211</sup> and has abstained, perhaps out of necessity, from relying on the historical context that so often provides an interpretive frame for its First

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205. 92 CONG. REC. 2338 (1946) (introducing House Resolution 557, a resolution to establish the special committee in the House); *see also* S. REP. NO. 1011, at 27 (1946).

206. Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (1946) (repealed 1995).

207. *Compare id.*, with 80 CONG. REC. 9430-31 (1936), and S. 2512, 74th Cong. (1935).

208. 92 CONG. REC. 6552 (1946).

209. *See, e.g.*, TASK FORCE ON FED. LOBBYING LAWS, *supra* note 31, at 6 n.53; Moshe Cohen-Eliya & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL’Y REV. 265, 286 (2011); Craig Holman, *Disclosure Is Fine, but Genuine Lobbying Reform Must Focus on Behavior*, ADMIN. & REG. L. NEWS, Summer 2006, at 5, 5.

210. U.S. CONST. amend. I.

211. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (noting that First Amendment analysis necessarily draws on contextual history of First Amendment text and has “long eschewed any ‘narrow, literal conception’ of the Amendment’s terms” (quoting *NAACP v. Button*, 371 U.S. 415, 430 (1963))).

Amendment jurisprudence.<sup>212</sup> A review of the legislative history and doctrine reveals that much of this simple textualism derives from the heavy involvement of a single individual: famed textualist and First Amendment absolutist Hugo Lafayette Black.

Justice Hugo Black is often referred to as the “patron saint” of modern textualism.<sup>213</sup> But among his lesser-known accomplishments is his role as the patron saint of modern lobbying law. Black drafted the first comprehensive scheme to regulate lobbying, a bill that provided the foundation for our current lobbying regime,<sup>214</sup> while serving as Senator for Alabama and drafted the pillars of our Petition Clause doctrine<sup>215</sup> after his appointment to the Court.<sup>216</sup> To each, Black applied his self-described “literalist”<sup>217</sup> interpretative method.

Following his appointment to the Supreme Court, Justice Black drafted *Noerr*, the first case to address the right to petition in any depth, and a number of other key cases in the Petition Clause constellation.<sup>218</sup> In each, Black brought his normative distinction between petitioning and lobbying and his “literalist” interpretive method to bear on the Clause. Although Black described his methodology as friendly to the incorporation of context and history in the interpretation of text,<sup>219</sup> at that time the history of petitioning was not before the Court.<sup>220</sup> Without an understanding of the history of the petition right,

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212. *We the People Found., Inc. v. United States*, 485 F.3d 140, 145 (D.C. Cir. 2007) (Rogers, J., concurring) (describing the Court’s regular reliance on history and rejection of a “literalism” approach in interpreting the First Amendment and collecting cases).

213. *See, e.g.*, Pamela S. Karlan, *Bullets, Ballots, and Battles on the Roberts Court*, 35 OHIO N.U. L. REV. 445, 449 (2009).

214. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-14 (2014).

215. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

216. *See infra* Part II.B.1.

217. Although Black and others have described Black’s early textualist method as “literalist,” the term is a bit of a misnomer. The more accurate term would be “semantic-ist,” denoting a narrow focus on the semantic meaning of text. Stephen C. Levinson, *PRAGMATICS* 17-18 (2009) (describing the distinction as one between Grice’s speaker-meaning and sentence-meaning, but also noting that the distinction is not always clear). As contemporary legislation scholars, including John Manning, have identified, the “literalist” textualists of the Progressive Era suffered from the inaccuracies of interpreting text in the absence of context. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108-09 (2001). Modern textualists have remedied these earlier interpretive missteps by incorporating an understanding of context as defined by the field of pragmatics. *Id.*

218. *See infra* Part II.B.2.

219. HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 10 (1968).

220. *See, e.g.*, Brief for the Petitioners at 25-28, 28 n.21, *Noerr*, 365 U.S. 127 (No. 50) 1960 WL 98829; *see also* *We the People Found., Inc. v. United States*, 485 F.3d 140, 148-49 (D.C. Cir. 2007) (Rogers, J., concurring) (noting that the Court had not yet tussled with the historical argument in relation to the Petition Clause and speculating that the change

Black turned to the text of the Petition Clause devoid of context and against a background of changed circumstances. As is common for decontextualized interpretations,<sup>221</sup> the Court's "literalist" interpretation of the Petition Clause resulted first in an overinclusivity—for example, merely containing the term "petition" or "grievance" brought practices within the purview of the doctrine, and the Court expanded the petition right to include filing "petitions" in courts and administrative agencies, the filing of "grievances" by public employees, and any form of legislative advocacy.<sup>222</sup>

In the absence of this context, the Court has struggled to provide clear and fixed meanings to the Petition Clause, often conflating practices historically distinct but termed similarly in modern parlance. Eventually succumbing to the lack of structure behind its Petition Clause analysis, thirty years ago the Court effectively subsumed the right to petition under the more developed doctrine of the Free Speech Clause.<sup>223</sup> It was not until 2011, when faced with this history, that the Court began to contextualize and clarify its Petition Clause analysis in order to establish a distinct Petition Clause doctrine.<sup>224</sup>

Scholars have been quick to criticize this doctrinal muddle,<sup>225</sup> but the development of the doctrine in disparate substantive fields of law, from labor to civil rights, has prevented the criticism from forming a chorus loud enough to be heard. More importantly, the lack of intensive regulation and litigation in the field of lobbying law and the development of the Petition Clause doctrine between camps of legal scholarship has deterred a comprehensive

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in doctrine would prove drastic given the Court's preference for reliance on history in interpretation of the First Amendment).

221. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 419-20 (1989). Although interpretive theory in this area is still ripe for future development, Sunstein also begins to describe the interaction between literalism and changed circumstances. *Id.* at 422-23.

222. See *infra* Part II.B.2. This process is referred to in linguistics as "word-sense disambiguation," or the ability of humans to discern from context the particular sense of the meaning of the word used. Mark Stevenson & Yorick Wilks, *Word-Sense Disambiguation*, in THE OXFORD HANDBOOK OF COMPUTATIONAL LINGUISTICS 249, 249 (Ruslan Mitkov ed., 2003). As Stevenson and Wilks describe, the term light could denote weight, as in "not heavy," or "illumination." *Id.* at 249.

223. *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985).

224. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

225. See, e.g., RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 10 (2012); Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1302 (2003); John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, ANTITRUST, Summer 2003, at 36, 36-37; Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1177-79 (1992); William A. Herbert, *The Chill of a Wintry Light?: Borough of Duryea v. Guarnieri and the Right to Petition in Public Employment*, 43 U. TOL. L. REV. 583, 617-22 (2012); Smith, *supra* note 34, at 1153.

review of the Petition Clause doctrine. What follows is the beginning of a broader review of the doctrine and an effort to highlight the incoherence wrought on the right to petition through the lack of a contextualized interpretation.

### 1. Origins

Although the Supreme Court referenced the right to petition in dicta in two nineteenth-century opinions—once as a predicate to the right to associate<sup>226</sup> and another as a predicate to the right to interstate travel<sup>227</sup>—the Court’s first opportunity for substantive analysis of the right to petition came in 1954. In an era of increasing political ferment, 1954 began the term that the Court decided *Brown v. Board of Education*<sup>228</sup> and that the world’s leaders convened in Geneva in efforts to bring peace in Vietnam. Also in that same year, in *United States v. Harriss*, the Court reviewed a First Amendment challenge to the statute born of Senator Black’s early handiwork and the first statute to provide comprehensive regulation of lobbyists: the Federal Regulation of Lobbying Act of 1946.<sup>229</sup>

The sections of the Lobbying Act at issue in *Harriss*, sections 305, 307, and 308, mandated registration requirements for all individuals and groups who accepted money to influence “directly or indirectly” legislation in Congress and required quarterly reporting of all moneys received and expended, as well as the name of the legislation lobbied for or against.<sup>230</sup> Application of the Lobbying Act was broad and the statute purported to regulate

any person . . . who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.<sup>231</sup>

The Lobbying Act also built on Black’s framework by adding the additional penalty of a three-year lobbying ban for any violations of the registration and disclosure requirements.<sup>232</sup>

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226. *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876).

227. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1868).

228. 349 U.S. 294 (1955).

229. *United States v. Harriss*, 347 U.S. 612, 617 (1954); *see also* Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (repealed 1995).

230. *Id.* at 614 n.1, 618-19.

231. *Id.* at 618-19 (quoting 2 U.S.C. § 266).

Despite the victory celebrated by reformers following passage of the Lobbying Act, the scheme suffered from serious flaws, not the least of which was hurried, compromised drafting throughout the Act.<sup>233</sup> In addition to clumsy drafting errors, the Act was also structurally unsound and lacked an enforcement mechanism outside of criminal penalties, which were presumably enforceable by the Department of Justice.<sup>234</sup> The Act's disclosure requirements were also unclear and treated contributions *by* lobbyists and contributions *to* lobbyists as functionally identical expenditures.<sup>235</sup> Not surprisingly, given the questionable enforcement measures, very few prosecutions were brought pursuant to the Lobbying Act, and it took eight years for a constitutional challenge to come before the Court.<sup>236</sup>

On direct appeal to the Supreme Court under the Criminal Appeals Act,<sup>237</sup> the United States challenged the United States District Court for the District of Columbia's dismissal of an information against a number of associational and individual defendants.<sup>238</sup> Relying on *National Ass'n of Manufacturers v. McGrath*,<sup>239</sup> the lower court had held the statute unconstitutional and dismissed the ten-count information,<sup>240</sup> which charged multiple violations of the Lobbying Act.<sup>241</sup> The government appealed.

In *Harriss*, Chief Justice Warren, writing for the Court, reversed the district court's dismissal and upheld the Lobbying Act as constitutional. In reaching this decision, the Court reviewed the constitutionality of four provisions of the Lobbying Act on vagueness and First Amendment grounds.<sup>242</sup> Because *Harriss* is so uniformly presumed as the case where the

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232. *Id.* at 626-27.

233. *See id.* at 631 (Douglas, J., dissenting) (noting that the majority was "rewrit[ing] the Act" by providing a limit on the definition of "lobbying" because the language used in the Act was expansive and lacked any real limit).

234. *See id.* at 633-34 (Jackson, J., dissenting).

235. *See id.* at 633 ("The Act passed by Congress would appear to apply to all persons who . . . (2) receive and expend funds for the purpose of lobbying, or (3) merely expend funds for the purpose of lobbying."); *see also* Federal Regulation of Lobbying Act of 1946, Pub. L. No. 79-601, tit. III, 60 Stat. 812, 839 (repealed 1995).

236. Eskridge, *supra* note 183, at 12.

237. Act of March 2, 1907, ch. 2564, 34 Stat. 1246.

238. *Harriss*, 347 U.S. at 613-17.

239. In *National Ass'n of Manufacturers*, 103 F. Supp. 510 (D.D.C. 1952), a three-judge panel struck down sections 303 through 307 of the Lobbying Act as unconstitutionally vague in contravention of the Due Process Clause of the Fifth Amendment and held section 310(b), the lobbying ban penalty, unconstitutional under the Free Speech and Petition Clauses of the First Amendment. *Id.* at 514.

240. *United States v. Harris*, 109 F. Supp. 641, 641-42 (D.D.C. 1953), *rev'd*, 347 U.S. 612.

241. Brief for the United States, *Harriss*, 347 U.S. 612 (No. 32), 1953 WL 79232, at \*3, \*22-23.

242. *Harriss*, 347 U.S. at 617 ("The 'invalidity' of the Lobbying Act is asserted on three grounds: (1) that §§ 305, 307, and 308 are too vague and indefinite to meet the

Supreme Court held definitively that Congress violates the Petition Clause by banning or heavily regulating lobbying, including a notable recent misreading by the Supreme Court in *Citizens United v. FEC*,<sup>243</sup> it is worthwhile to explore the case in depth to dispel this presumption.

The Court began in *Harriss* with a vagueness challenge. With respect to the disclosure requirement, the Court avoided any accusations of vagueness by interpreting the requirements to apply to paid lobbyists only.<sup>244</sup> In analyzing section 307, the definition of lobbying, the Court drew on *United States v. Rumely*, a case that interpreted similar statutory language and legislative history, to clarify that the Act applied to “lobbying in its commonly accepted sense” only,<sup>245</sup> that is, “to direct communication with members of Congress on pending or proposed federal legislation.”<sup>246</sup> Following this clarification of section 307, the Court held that its narrowed construction rendered the disclosure requirement sufficiently definite to survive constitutional scrutiny.<sup>247</sup>

Turning next to the First Amendment, the Court addressed all clauses en masse and held in a summary fashion that the disclosure and registration requirements of the Lobbying Act, as construed, “d[id] not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government.”<sup>248</sup> Its analysis was similarly general and held that the state interest in providing lawmakers and the public information on who was pressuring Congress and in “maintain[ing] the integrity of a basic governmental process” outweighed any potential chilling effect on the exercise of “First Amendment rights.”<sup>249</sup> Although the Court did not specify the

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requirements of due process; (2) that §§ 305 and 308 violate the First Amendment guarantees of freedom of speech, freedom of press, and the right to petition the Government; (3) that the penalty provision of § 310 (b) violates the right of the people under the First Amendment to petition the Government.”).

243. 558 U.S. 310 (2010).

244. *Id.* at 618-19.

245. *Id.* at 620 (quoting *United States v. Rumely*, 345 U.S. 41, 47 (1953)).

246. *Id.*

247. *Id.* at 622-24.

248. *Id.* at 625.

249. *Id.* at 625-26. Although the Court approached its First Amendment analysis without specifying a particular clause, the balancing test applied by the Court bore a similarity to a line of cases later termed the compelled-speech doctrine and, given the fact that the Lobbying Act was a disclosure regime, the similarity should come as no surprise. Originating in 1943 with *West Virginia State Board of Education v. Barnette*, the compelled-speech doctrine held that the Free Speech Clause “includes both the right to speak freely and the right to refrain from speaking at all.” 319 U.S. 624, 645 (1943) (Murphy, J., concurring). Similar to the reasoning in *Harriss*, the Court initially identified the right as one generic to the “First Amendment,” without specifying a particular clause. *Id.* at 642 (majority opinion). It was not until 1977 in *Wooley v. Maynard* that the Court stated explicitly that the compelled-speech doctrine sourced

particular clause on which its determination rested, its analysis resembled its later compelled-speech doctrine developed to analyze similar disclosure regimes.<sup>250</sup>

Finally, the Court addressed the challenge to section 310(b), the three-year lobbying ban as a penalty for failing to comply with the registration and disclosure requirements, as violative of the Petition Clause.<sup>251</sup> The challenge to section 310(b) on Petition Clause grounds presented the only clear right to petition challenge against the only clear prohibition on petitioning and lobbying activity in *Harriss*. The Court expressly *declined* to reach this issue. Explaining that section 310(b) was a penalty and, therefore, had not yet been applied to the defendants and might not ever apply if they were found innocent, the Court found it “unnecessary to pass on [the] contention” whether the lobbying ban in section 310(b) violated the Petition Clause.<sup>252</sup> Contrary to broad misconception, in reviewing the first comprehensive scheme regulating lobbying and the last lobbying regulatory scheme to come before it, the Court declined to address whether the Petition Clause prohibited Congress from regulating lobbying.<sup>253</sup>

## 2. Applying the clause to “lobbying”

To the extent that a law of public engagement with the lawmaking process exists, Hugo Black had an influential hand in crafting it. Seven years after *Harriss*, Justice Black spurred the development of what would become our modern Petition Clause doctrine. This early doctrine also bore Black’s broad conception of the right and his “literalist” interpretation of the Petition Clause. In drafting *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,<sup>254</sup> Justice Black addressed the meaning of the Petition Clause for the first time in depth, introducing into the doctrine his literalist interpretation of the right to petition as encompassing any form of advocacy aimed at influencing

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from the Free Speech Clause. *See* 430 U.S. 705, 714 (1977). Later cases have followed suit and have consistently analyzed disclosure regimes as affronts to the right of free speech. *See* *Doe v. Reed*, 561 U.S. 186, 196 (2010) (noting a series of cases analyzing First Amendment challenges to disclosure requirements); *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) (analyzing disclosure and disclaimer provisions under the compelled-speech doctrine).

250. *Compare* *Harriss*, 347 U.S. at 625-26 (upholding a disclosure regime on the grounds that it provided information necessary for well-informed legislators and noting that the regime did not prohibit speech), *with* *Citizens United*, 558 U.S. at 366-67 (upholding a disclosure regime on the grounds that it provided information necessary for a well-informed electorate and noting that the regime did not prohibit speech).

251. *Harriss*, 347 U.S. at 626-27.

252. *Id.* at 627.

253. *Id.*

254. 365 U.S. 127 (1961).

government action, no matter the audience and no matter the form. Black's broad literalism, omitting all reference to the historical context that defined the scope of the right, would set the stage for a series of cases that articulate the petition right as it stands today.

In *Noerr*, the Court reviewed a gaggle of antitrust claims under the Sherman and Clayton Acts that railroad and trucking operators had aimed at one another in the midst of a freight war.<sup>255</sup> The association for the trucking industry had initiated the suit, alleging that the association for the railroad industry had engaged in anticompetitive conduct with its publicity campaign against the truckers.<sup>256</sup> In particular, the truckers alleged that the railroads had conducted a public directed-advocacy campaign, using the "third-party technique,"<sup>257</sup> whereby the railroad's public relations firm would foster fake "so-called 'independent' citizens groups" that would "circulate false and malicious propaganda" that aimed to stop the passage of legislation favorable to the truckers.<sup>258</sup> While a few allegations alluded to contact with government officials, the truckers' complaint largely focused on anticompetitive conduct directed at the public.<sup>259</sup> Rather than anything analogous with the historical petition right, the truckers' complaint fell quite squarely into the domain of the Free Speech Clause.

In fact, the railroads in *Noerr* argued the case under the anonymous speech doctrine<sup>260</sup> and attempted to distinguish *United States v. Harriss* and others like it.<sup>261</sup> These earlier cases had balanced protections for anonymous speech with lawmakers' strong informational interest in knowing the identity of the speaker.<sup>262</sup> Distinguishing these cases on the ground that they dealt with direct participation in the lawmaking process, the railroads argued that this case was aimed at influencing *public discourse* and, thus, attempts to speak anonymously through "third-party" campaigns should incur heightened speech protections.<sup>263</sup> The Court was persuaded that the case raised First Amendment concerns, but rather than relying on the Free Speech Clause and the anonymous speech doctrine, the Court *sua sponte* analogized the railroads' conduct to petitioning.<sup>264</sup>

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255. See *id.* at 129-30.

256. *Noerr Motor Freight, Inc. v. E. R.R. Presidents Conference*, 113 F. Supp. 737, 741 (E.D. Pa. 1953).

257. Brief for the Petitioners, *supra* note 220, at 27.

258. *Noerr*, 113 F. Supp. at 741.

259. See *id.* at 741-42.

260. Brief for the Petitioners, *supra* note 220, at 27.

261. *Id.* at \*29-30.

262. See *id.* (citing *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

263. See *id.* at 23, 29-30.

264. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).



Writing for the Court, Justice Black again invoked his understanding of petitioning as a practice that spanned broadly to encompass any form of legislative advocacy and communication, no matter the audience.<sup>265</sup> As Justice Black had known all too well from his days as a senator, “[i]n a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.”<sup>266</sup> To Black, who had served in the Senate after the formal process of petitioning had fallen into disuse, any form of communication directed at the public or otherwise regarding a legislative matter fell into the category of petitioning.<sup>267</sup> Accordingly, any interpretation of the Sherman Act that might impede this fundamental mechanism of representation could not accurately depict the intent behind the Act, Justice Black wrote, and had no basis in its legislative history.<sup>268</sup> It was only in the alternative that the Court relied on the Petition Clause, citing potential constitutional questions with any restriction the Act placed on “mere solicitation of governmental action with respect to the passage and enforcement of laws.”<sup>269</sup>

### 3. Expanding the clause to courts and the executive

Over the next twenty years, applying the same literalist interpretation of the petition right established in *Noerr* and in the absence of context around the history and meaning of the right to petition, the Court expanded the petition right to protect anything termed a “petition” filed in formal proceedings in the judicial and executive branches.<sup>270</sup> The Court began by bringing “petitions” filed in courts under the protection of the Petition Clause. Then, relying on

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265. *See id.* at 137-39.

266. *Id.* at 137.

267. Four years later, in *United Mine Workers v. Pennington*, the Court revisited *Noerr*'s exception to the Sherman Act for legislative advocacy and squarely applied the exception to conduct that more closely resembled petitioning—namely, direct engagement with the Secretary of Labor. 381 U.S. 657, 669-70 (1965).

268. *Noerr*, 365 U.S. at 138-39.

269. *Id.* at 138. Some have called into question the extent to which *Noerr* rested its analysis on Justice Black's Petition Clause reasoning, rather than on a simple interpretation of the Sherman Act. *See, e.g., Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2502-03 (2011) (Scalia, J., concurring).

270. A quick point of theoretical clarification: I am critical only of the grounds for the Court's expansion of the petition right to courts and the executive. A contextualized reading of the Petition Clause could very likely support such an expansion, as the petition process historically included an incredible amount of interbranch efforts at petition resolution. The criticism of the doctrine in this Subpart focuses on the reasoning on which the expansion is grounded and the “literalist” method employed, which ignored the history and the nuances that history would bring to the doctrine.

this doctrine, the Court further expanded the reach of *Noerr-Pennington* antitrust immunity to judicial and executive “petitioning.”

Two years after *Brown v. Board of Education* and for the first time in almost a hundred years, the state of Virginia amended certain professional ethics rules governing client solicitation by lawyers.<sup>271</sup> The amendment prohibited solicitation of legal business by any “individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.”<sup>272</sup> As part of their efforts at integration, the NAACP solicited the parents of Virginia school children to become clients and then provided those parents with an attorney.<sup>273</sup> Not coincidentally, this amendment brought the litigation strategy implemented by the NAACP to integrate southern schools squarely within the prohibitions of the ethics rules.<sup>274</sup> The NAACP challenged the rules in state court primarily on Fourteenth Amendment due process and equal protection grounds, but the Virginia courts upheld the laws.<sup>275</sup> The NAACP then petitioned for certiorari, and the Supreme Court reversed.<sup>276</sup>

In what was likely a surprising move, the Court declined to adopt the NAACP’s primary argument: that the rules offended notions of due process and equal protection and, therefore, violated the Fourteenth Amendment.<sup>277</sup> Justice Brennan, writing for the Court, relied instead on the NAACP’s alternative grounds and struck down the ethics rules as violative of the First Amendment.<sup>278</sup> Echoing the approach taken in *Harriss*, the Court addressed the First Amendment en masse, conflating the rights to speak, associate, and petition under a conjoined right that the Court referred to as a right to “vigorous advocacy.”<sup>279</sup> The First Amendment, the Court held, protected “vigorous advocacy” against government regulation because it constituted a form of political expression.<sup>280</sup> The Court reasoned that political expression in the form of filing petitions in court was essential for minorities who would “find themselves unable to achieve their objectives through the ballot” and where “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of

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271. NAACP v. Button, 371 U.S. 415, 423 (1963).

272. *Id.*

273. *Id.* at 421.

274. *Id.* at 423-26.

275. *Id.* at 424-26, 428 n.10.

276. *Id.* at 417-18, 428.

277. *Id.* at 428.

278. *Id.* at 428-29.

279. *See id.* at 429.

280. *Id.*

grievances.”<sup>281</sup> Among other purely associational rights, the Court also relied on *Noerr* for the principle that disruption of organized legislative advocacy could raise important “First Amendment” questions.<sup>282</sup> Later opinions, drafted by Justice Black, made clear that the right of access to courts rested firmly within the specific protections of the Petition Clause.<sup>283</sup>

A few years after *NAACP v. Button*, the Court expanded the scope of the Petition Clause again to include the “petitions” filed by prisoners pursuant to the writ of habeas corpus.<sup>284</sup> Justice Fortas wrote for the Court in *Johnson v. Avery* and struck down a Tennessee statute prohibiting prisoners from assisting other prisoners with habeas corpus petitions.<sup>285</sup> The state of Tennessee, finding the quality of habeas petitions falling rapidly in the hands of untrained “jailhouse lawyers”—prisoners turned professional petition writers—had decided to ban the practice.<sup>286</sup> In striking down the law, the Court held that the ban, in the absence of the prison offering any alternative, effectively barred uneducated and illiterate prisoners from exercising the “right to apply to a federal court for a writ of habeas corpus”<sup>287</sup>—a right the Court later clarified derived from the Petition Clause.

Finally, just a few months after Justice Black retired from the bench, the Court took what it saw as the next natural step under *Johnson* and expanded the *Noerr-Pennington* “lobbying” exception to reach advocacy directed at the courts and the executive.<sup>288</sup> “Certainly,” Justice Douglas wrote in reliance on *Johnson*, “the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right to petition.”<sup>289</sup> Belying this expansive interpretation, the facts of *California Motor Transport Co.* challenged the Court’s earlier absolute petition right. Rather than a simple antitrust claim involving allegations of judicial and administrative actions, the association in *California Motor Transport Co.* alleged that a competitor had initiated a flood of judicial and administrative actions as a means to crowd out

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281. *Id.* at 429-30.

282. *Id.* at 430.

283. *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 221-22 (1967) (holding that the right to petition protects unions’ ability to provide staff counsel to represent membership in workers’ compensation claims and that the petition need not be solely for political purposes); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964) (holding that the union members’ ability to recommend lawyers to one another for litigation is protected by the Petition Clause because the right to petition the courts cannot be so handicapped).

284. *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

285. *Id.* at 484, 490.

286. *See id.* at 484-88.

287. *Id.* at 486-87 (quoting *Ex parte Hull*, 312 U.S. 546, 549 (1941)).

288. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

289. *Id.*

and undermine the associations' own pending actions.<sup>290</sup> The competitor was functionally engaging with the courts and agencies as an advocate, but the alleged purpose of the actions was to blockade the court and agencies from the advocacy of others.<sup>291</sup>

Black's literalist right to petition from *Noerr* that promised unfettered access to formal government institutions began to call out for a limiting principle.<sup>292</sup> Unlike the marketplace of ideas for speech, access to these institutions was a finite resource, and the right to petition could not mean absolute access that disrupted the functioning of government and foreclosed the access of others.<sup>293</sup> That the conduct was unethical, however, would not provide the limit. *Noerr* had confronted a large-scale public relations campaign where the railroad industry had organized fake advocacy associations and engaged in "third party technique" campaigns under the identities of well-known and well-compensated experts, but the Court had still shielded the conduct from the antitrust laws.<sup>294</sup> Later cases further emphasized that the exception in *Noerr* applied to any "concerted effort to influence public officials regardless of intent or purpose."<sup>295</sup>

Maneuvering carefully around these earlier exceptions, the Court seized on some spare language in *Noerr*<sup>296</sup> and crafted what is known as the sham exception to the *Noerr-Pennington* doctrine.<sup>297</sup> Under this exception, the Court declined to shield the association's executive and judicial actions on the ground that the actions were mere "shams"—i.e., not a "concerted effort to influence public officials" but conduct aimed at blocking a competitor's access to government.<sup>298</sup> The Court analogized the sham exception to abuse of government process in many other contexts—for example, obtaining a patent through fraud to block a competitor or bribing a government official.<sup>299</sup> Contrary to *Noerr*'s broad right to petition that shielded advocacy through formal process, the sham exception allowed liability for advocacy that had a

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290. *Id.* at 509, 511.

291. *Id.* at 512.

292. *See id.*

293. *See id.* at 515.

294. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961).

295. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (emphasis added).

296. *Noerr*, 365 U.S. at 144 ("There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.").

297. *Cal. Motor Transp. Co.*, 404 U.S. at 511.

298. *Id.* at 515-16.

299. *Id.* at 512-13.

tendency to “corrupt the administrative or judicial processes.”<sup>300</sup> The sham exception has failed to provide much of a limit. Most notably and with some irony, lower courts have declined to apply the sham exception to the context from which it derived in *Noerr*—that is, legislative petitioning—because abandonment of the formal petition process has left the courts without a baseline against which to gauge improper advocacy.<sup>301</sup> To the Court, our lobbying system of today in Congress is seen as “no holds barred.”

#### 4. Conflating the clause into speech

Engagement with government outside of the formal processes offered by litigation and administrative actions presented the Court with an even greater challenge. Black himself struggled to draw this fine distinction. As a former legislator who had served during a period where formal petitioning had receded from view, Black’s decontextualized understanding of petitioning defined petitioning so broadly as to include any form of advocacy that addressed legislation. Also, as an absolutist, Black eschewed a First Amendment doctrine that balanced the limitation of a First Amendment right against any government interest, including the continued functioning of government.<sup>302</sup> These two views presented particular challenges in the context of petitioning. In contrast to speech directed at an open marketplace, petitioning addressed direct engagement with government, which could require affirmative government action and had the potential to wholly disrupt government functioning. There are meaningful differences between limiting government interference with a political speech in a park and requiring the government by constitutional fiat to allow the same speech on the floor of Congress or inside a prison, but the Petition Clause doctrine failed to provide the Court the tools to manage these differences.

The Court had begun to establish some limits on the petition right with respect to formal litigation and agency actions, but outside of those formal processes and without the history to guide it, there was little to assist the Court in limiting the right. Had the Court looked to the history, as the Court had with its speech doctrine, it might have provided some formal limits to the petition right. But the history was not before the Court. Given the overlap between the broad petition right and free speech, the Court began to look for

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300. *Id.* at 513.

301. *See, e.g.,* *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1094 (9th Cir. 2000) (“The sham exception is more easily applied to litigation, however, than it is to lobbying before executive or legislative bodies.”); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 204, at 262 (2015).

302. HOWARD BALL, *HUGO L. BLACK: COLD STEEL WARRIOR* 188-89 (1996); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 143 (2010); JAMES J. MAGEE, *MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT* 5 (1980).

limits within the fully developed speech doctrine, eventually conflating the two clauses.<sup>303</sup>

The doctrine of protest was an area in which the Court, including in opinions drafted by Black, began to conflate petitioning and speech early on and so it bears particular mention. In the early 1960s, at the height of the civil rights movement, law enforcement officers arrested over 150 African-American students for entering and protesting on the South Carolina state legislature's grounds in alleged breach of the peace.<sup>304</sup> The students met at a nearby church and walked together to the grounds in order to protest. The purpose of this protest, as described by the students, was

to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and dissatisfaction with the present condition of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed.<sup>305</sup>

The students challenged their convictions on First Amendment grounds and, in *Edwards v. South Carolina*, the Court held that the students had exercised their First Amendment rights "in their most pristine and classic form."<sup>306</sup> Although the Court did not specify explicitly that it rested its decision on the Petition Clause, it described the protest as a peaceable assembly whereby the students "expressed their grievances 'to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.'"<sup>307</sup> In striking down the convictions as violative of the students' "First Amendment freedoms," the Court noted especially that the legislature was located on the grounds of the protest and was in session on that day.<sup>308</sup>

Later cases struggled, however, to maintain the distinct doctrine of protest as petition, rather than speech. Just a few years after the Court's ruling in *Edwards*, the Court faced a nearly identical set of facts in *Adderley v. Florida*.<sup>309</sup> On an afternoon in Florida, approximately 200 students walked from their nearby school to the local jail in order to protest the jail's discriminatory policy of segregation and the recent arrest of their classmates following another protest.<sup>310</sup> When a number of students declined to leave the jail premises upon

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303. The Court has heard a number of cases that could have been petition cases but were treated as speech. *See, e.g.*, *Perry v. Sindermann*, 408 U.S. 593 (1972); *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952) (Black, J., dissenting).

304. *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963).

305. *Id.* at 230.

306. *Id.* at 235.

307. *Id.*

308. *Id.* at 235 & n.10.

309. 385 U.S. 39, 40 (1966).

310. *Id.* at 44-45.

request by custodians of the jail, the police arrested the students for trespass.<sup>311</sup> Justice Black, writing for the Court, unexpectedly upheld the convictions. Without mention of his expansive petition right, Black distinguished *Edwards* and upheld the law on speech principles, invoking reasoning that sounded in the public forum doctrine familiar to free speech.<sup>312</sup> Unlike the capitol grounds, Black reasoned, the jail had not been traditionally open to the public.<sup>313</sup> Moreover, the students had entered the jail through a driveway not open to public traffic and “without warning to or permission from the sheriff.”<sup>314</sup>

The dissent took issue with Black’s framing of the case as dealing simply with speech.<sup>315</sup> As an outgrowth of the executive, the jail, the dissent argued, was as much a branch of government as the courts and legislatures, and the Court had defined a broad petition right under *NAACP v. Button* that spanned across all three branches.<sup>316</sup> Given the Court’s earlier holdings, whether the jail had been open to the public was immaterial in the dissent’s view to analysis of the case under the Petition Clause and was even less important in cases addressing the rights of minorities where the “[c]onventional methods of petitioning may be, and often have been, shut off to large groups of our citizens.”<sup>317</sup> The dissent argued vigorously that the students had not disrupted the jail, nor had the students obstructed the entrances to the jail, and they had moved upon request.<sup>318</sup> But a limitless petition right that allowed groups to enter government property, even prisons, at any time and without notice was too much for the Court—and even Justice Black—to bear. Out of necessity, the Court began to back away from its Petition Clause doctrine.

The Court’s steady project of conflating the Free Speech and Petition Clauses finally came to a conclusion in a pair of cases brought before the Court in the mid-1980s.<sup>319</sup> In the first, *Minnesota State Board for Community Colleges v. Knight*, the Court reviewed a challenge brought by community college instructors against a Minnesota statute that assigned the instructors a representative with whom the state college would “meet and confer” over college administrative matters and employment terms for the faculty.<sup>320</sup> The

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311. *Id.* at 40.

312. *Id.* at 41.

313. *Id.*

314. *Id.*

315. *Id.* at 48-50 (Douglas, J., dissenting).

316. *Id.* at 49-51.

317. *Id.* at 50.

318. *Id.* at 51-52.

319. For an additional case that ignored the speech-petition distinction, see *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

320. 465 U.S. 271, 273-75 (1984).

instructors took issue with the statute because it prevented anyone aside from the assigned representative from attending and participating in the meet-and-confer sessions. That the college refused to “meet and confer” with them over college administrative policy and employment terms, the instructors alleged, violated their First Amendment rights. Justice O’Connor, writing for the Court, upheld the law and, without citation to any earlier cases developing the broad petition right, stated in sweeping terms that “[n]othing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.”<sup>321</sup> The Court framed the instructors’ argument as one radically more broad than a simple request for access to a public forum. Rather, the Court saw in the instructors’ case an effort to create a constitutional right out of whole cloth that would afford individuals a “right to participate directly in government” and would require all branches of government “to afford every interested member of the public an opportunity to present testimony before any policy is adopted.”<sup>322</sup>

Such a right, the Court reasoned, “would work a revolution in existing government practices,” raise concerns of federalism and separation of powers, and transform our republican form of government into a direct democracy.<sup>323</sup> Nowhere in the opinion does the Court reference the history of the petition process, and later courts have noted that the history was not before the Court at that time.<sup>324</sup> Confronted with a request for an expansive petition right devoid of any limiting principle that the history of the Petition Clause could provide, the Court was unable to envision a more limited form of formal public engagement with the lawmaking process. Consequently, the Court may have stripped the petition right of one of its core distinctive characteristics—that is, the right to formal consideration and response—and conflated implicitly the right to petition and the speech right.

The Court issued the opinion generally recognized as conflating explicitly the Free Speech and Petition Clauses a few months later.<sup>325</sup> In *McDonald v. Smith*, the Court again reviewed a narrow question: whether immunity from libel extended to letters sent to the President.<sup>326</sup> The letters’ aim was to disrupt the appointment process for a potential U.S. Attorney whom the letter accused

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321. *Id.* at 285.

322. *Id.* at 284.

323. *Id.*

324. *We the People Found., Inc. v. United States*, 485 F.3d 140, 145 (D.C. Cir. 2007) (Rogers, J., concurring).

325. *KROTOSZYNSKI*, *supra* note 225, at 157; *see also* *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985) (“Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.”).

326. 472 U.S. 479, 480 (1985).



of fraud and other ethical violations.<sup>327</sup> The letters had their intended effect, and the thwarted candidate commenced a libel action.<sup>328</sup> The Court's holding was narrow: even assuming the letters were petitions, they were subject to the libel laws.<sup>329</sup> Despite this seemingly narrow holding, many read the Court's sweeping language in the opinion as the death knell for a distinctive Petition Clause doctrine.<sup>330</sup> In particular, the Court described the right to petition as "cut from the same cloth as the other guarantees of [the First] Amendment," and it held the right "inseparable" from the "freedoms to speak, publish, and assemble."<sup>331</sup> In light of this inseparability, the Court held, "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."<sup>332</sup>

The Court's conflation of petitioning and speech inspired a flurry of scholarly commentary and criticism.<sup>333</sup> In just a few years following the Court's ruling in *McDonald*, a number of scholars began to unearth the history of petitioning in order to challenge the Court's decontextualized view of the Petition Clause.<sup>334</sup> Two historical pieces, published just months after the Court issued its decision in *McDonald*, provided a detailed history of petitioning at the Founding and stretching back to medieval England and criticized the Court for its failure to recognize the distinctive concerns at issue with the Petition Clause.<sup>335</sup> Many others soon followed, calling for a strengthened and distinctive petition right rooted in an historical understanding of the Clause.<sup>336</sup>

## 5. An historic revival

In 2011, the Court confronted the historical literature crafted post-*McDonald* for the first time in the context of a contentious employment dispute between a chief of police and his small-town employer in Pennsylvania. In *Borough of Duryea v. Guarnieri*, Charles Guarnieri brought suit against his city employer for retaliation, alleging violations of his Petition Clause rights.<sup>337</sup> Guarnieri had initially brought a public employee grievance pursuant to his

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327. *Id.* at 481.

328. *Id.*

329. *Id.* at 483.

330. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 717 n.431 (2002) (reviewing the literature).

331. *McDonald*, 472 U.S. at 482, 485.

332. *Id.* at 485.

333. See *supra* notes 34-36 and accompanying text.

334. *Id.*

335. See Smith, *supra* note 34, at 1153; Higginson, *supra* note 34.

336. See *supra* note 34 and accompanying text.

337. 131 S. Ct. 2488, 2492 (2011).

collective bargaining agreement, challenging his termination as chief of police.<sup>338</sup> In adjudicating the grievance, the arbitrator held that the city had committed procedural errors in processing Guarnieri's termination and ordered Guarnieri reinstated.<sup>339</sup> In processing the reinstatement, the city issued Guarnieri a series of additional job requirements and restrictions, which Guarnieri challenged as retaliatory in a subsequent employee grievance and a § 1983 action.<sup>340</sup>

The lower courts had recently split over whether the content of the grievance must address a matter of public concern in order to obtain protection under the Petition Clause.<sup>341</sup> Following the Court's conflation of the Petition and Free Speech Clauses in *McDonald*, many courts of appeals had begun to import the "public concern" doctrine from the Free Speech Clause, which prohibited retaliation claims against public employers unless the speech was a matter of public concern, into the Petition Clause doctrine of public employee grievances.<sup>342</sup> The Third Circuit in *Guarnieri* split the circuits by declining to apply the public concern doctrine.<sup>343</sup> The Supreme Court granted certiorari.

Writing for the Court, Justice Kennedy recounted the long history of petitioning from Magna Charta to the modern day and emphasized the importance of history in interpreting the Petition Clause as wholly distinct from the right to free speech.<sup>344</sup> Kennedy clarified that, contrary to broad misconception, the Court had not conflated the Free Speech and Petition Clauses in *McDonald* and that the rights aimed at distinct democratic functions: "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs."<sup>345</sup> Belying these distinctions, however, Kennedy went on to apply the public concern doctrine to Guarnieri's grievance.<sup>346</sup> The Court's reasons were pragmatic: to raise every employment dispute to a matter of constitutional significance would result in an inadministrable standard.<sup>347</sup> The same concerns that motivated the public concern doctrine in the context of speech were equally

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338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 2493.

342. *Id.*

343. *Id.*

344. *Id.* at 2499.

345. *Id.* at 2495.

346. *Id.* at 2501.

347. *Id.*

presented by employee grievances—namely, that the government needs a limiting principle to allow for less disruption to government operations by employee disputes—and allowing a different standard in the context of grievances could allow easy circumvention of the speech rule.<sup>348</sup> If every public employee grievance was a petition protected by the Petition Clause, as the Court assumed it had earlier held, this left the Court with no limiting principle in order to protect the efficient functioning of government from the flood of potential litigation.<sup>349</sup> The Court acknowledged the history and established a distinct Petition Clause doctrine, but it saw the public concern doctrine as a necessary limiting principle.

Justice Thomas and Justice Scalia were quick to criticize the Court's inconsistent application of the history.<sup>350</sup> Justice Scalia rightly observed that one of the primary functions of petitioning was the resolution of private concerns.<sup>351</sup> As his concurrence described, the "overwhelming majority of First Congress petitions presented private claims."<sup>352</sup> Not only did the protections of the Petition and Free Speech Clauses reside in separate texts in the Constitution, the clauses also served wholly different values.<sup>353</sup> Justice Scalia agreed that the Court would require a limiting principle, but he disagreed that transplanting the public-private distinction at the core of the First Amendment's marketplace-of-ideas values made any sense in the context of other constitutional protections.<sup>354</sup> It would likewise make little sense to say that the exercise of religion in public ought to be a matter of greater constitutional concern than practicing privately or to value due process concerns for public interest litigation over cases adjudicating private matters.<sup>355</sup> Because the rights themselves are wholly different, the public concern at the core of the Free Speech Clause simply has no place in the context of the Petition Clause.<sup>356</sup>

Drawing heavily on the history, Justice Scalia offered instead two other possible limiting principles, each of which bears particular mention here. First, he questioned the Court's presumption that it had earlier held public employee grievances and lawsuits to be petitions subject to protection under the Petition

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348. *Id.*

349. *See id.*

350. *Id.* at 2501 (Thomas, J., concurring in the judgment); *id.* at 2503 (Scalia, J., concurring in the judgment in part and dissenting in part).

351. *Id.* at 2505 (Scalia, J., concurring in the judgment in part and dissenting in part).

352. *Id.* at 2504 (quoting 8 DOCUMENTARY HISTORY, *supra* note 138, at xviii).

353. *Id.* at 2504-05.

354. *Id.* at 2506.

355. *Id.* at 2505.

356. *Id.*

Clause.<sup>357</sup> The Court's doctrine establishing lawsuits as "petitions" rested on as shaky ground as the lobbying doctrine; much of it was dicta or ambiguous statutory interpretation with related Petition Clause concerns.<sup>358</sup> Moreover, looking to the history, Justice Scalia found little direct evidence that the petition process ever engaged with courts.<sup>359</sup> If neither Guarnieri's grievance nor his lawsuit obtained Petition Clause protection, Justice Scalia reasoned, then there could be no corresponding suit for retaliation and the suit was clearly limited.<sup>360</sup> Alternatively, assuming that the Petition Clause protected lawsuits and grievances, Justice Scalia offered a second alternative limiting principle: the Petition Clause would protect only petitions brought against the government as a *sovereign* by citizens, rather than filings brought against the government as an *employer*.<sup>361</sup> As Justice Scalia admitted, such a rule would undoubtedly involve some level of ambiguity in application; but it would, at the very least, provide a limiting principle with greater relevance to the underlying right than the Free Speech Clause's public-private speech distinction.<sup>362</sup>

So in *Guarnieri*, the Court began the difficult process of exhuming distinct Petition and Free Speech Clauses from the Constitution and wrestling with the implications of that history for the petition right in the context of executive and judicial petitioning. The Court was receptive to the history and relied on it to clarify its doctrine, but pragmatic concerns brought about by earlier decisions and the parties' own concessions—the parties had litigated the case on the assumption that the grievance and lawsuit were petitions<sup>363</sup>—dampened the Court's reformist spirit.

The Court has yet to address this history in the context of legislative petitioning or lobbying, and courts have begun to speculate that the history could have important effects on the doctrine.<sup>364</sup> Because access to legislatures was of particular concern to the right to petition and because the doctrine around legislative petitioning is less developed, legislative petitioning and lobbying could provide a ripe area for a future Court to develop an independent Petition Clause doctrine. The following sections explore the implications of this contextualized interpretation for the petition right as applied to legislative advocacy and lobbying.

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357. *Id.* at 2502-03.

358. *Id.*

359. *Id.* at 2503-04.

360. *Id.* at 2505-06.

361. *Id.* at 2506-07.

362. *Id.* at 2506.

363. *Id.* at 2492, 2494 (majority opinion).

364. *See, e.g.,* *We the People Found., Inc. v. United States*, 485 F.3d 140, 145 (Rogers, J., concurring).

### III. Implications for the Doctrine

#### A. Contours of a Contextualized Right to Petition

The contours of the right to petition might appear less anomalous if one recalls that the right predated the invention of American elections by hundreds of years. Unlike the Free Speech Clause, a text often described as having electoral concerns at its core,<sup>365</sup> the Petition Clause protected a form of engagement with government wholly distinct from the majoritarian mechanism of the vote. Although lost to our understanding of constitutional law today,<sup>366</sup> the historical distinction between civil rights and political rights provides a helpful frame to begin to establish the right to petition as more than mere extension of the franchise. Courts in nineteenth-century America recognized a distinction between “civil rights”—or the rights afforded all inhabitants of the United States, regardless of station or demographic—and “political rights,” or the rights afforded elites in society to allow for participation in the political process.<sup>367</sup> The latter category included the rights to vote, to hold public office, and to serve on juries, while the former included a broad range of rights and freedoms, including the freedom of speech, freedom to worship, the right to contract, the right to hold property, and the right to sue and be sued.<sup>368</sup> The distinction between civil and political rights was used as a means to justify and explain the extension of these rights to some classes of individuals and not others.<sup>369</sup> To nineteenth-century Americans, it was not the case that white male landholders held all of the rights and that others held none but rather that different classes of individuals held different sets of rights.<sup>370</sup> Although women, free African Americans, Native Americans, and the foreign born suffered extensive injustice and subjugation during this period and beyond, these groups were in some instances at least nominally extended the same civil rights as others. These demographics did exercise property and

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365. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948); see also *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1823 (1999).

366. See Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208-10 (1992); see also G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RES. L. REV. 755, 758 (2014).

367. Tushnet, *supra* note 366, at 1208.

368. *Id.* at 1208-09, 1210 n.17, 1217.

369. See *id.* at 1208-11 (describing civil rights as attached to all people qua people and political rights as reserved to those people designated by a structured political system).

370. See *id.* at 1208-10; see also Ahkil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991).

contract rights, as well as bring suits in court.<sup>371</sup> White male landholders, on the other hand, enjoyed civil rights as well as the political power of the franchise.<sup>372</sup>

Historically, the right to petition afforded not a political right but a “civil” right and was open to all inhabitants equally.<sup>373</sup> Exercise of the right was not limited to the elite but was afforded to the politically powerful and powerless alike.<sup>374</sup> Jury service, voting, and holding elected office all involved majoritarian decisionmaking and hewed closely to the structure and function of the political process. By contrast, petitioning constituted more than a mere extension of these political rights. Like other civil rights, the right to petition afforded individuals the ability to engage with government even in the absence of the franchise and without the consideration of political power generally at issue in the electoral process.

In addition to functioning as a civil right, the right to petition was also an individual right. Some scholars, including Akhil Amar, have argued that the text and structure of the Petition Clause reveal a particularly majoritarian core.<sup>375</sup> By contrast, the Court has recently taken the position that the right to petition is an individual right and not a “collective” or majoritarian right.<sup>376</sup> This divergence between the Court and the scholarly literature is likely due to the Court’s conclusion that the Petition Clause is wholly distinct from the Assembly Clause that precedes it.<sup>377</sup> Other readings of the First Amendment, Amar’s included, lean heavily on the collective language of the Assembly Clause in articulating the collective and majoritarian nature of the right to petition.<sup>378</sup> In addition to conjoining assembly and petition, Amar reads “the people” of the First Amendment as an invocation of popular sovereignty and an echo of the Founding-era calls for convention. Although the text and structure of the Petition Clause might support Amar’s interpretation, the historical record largely supports the minority and individual view. While the petition process served as a vehicle for social organization and mobilization of many marginalized groups,<sup>379</sup> the petition right was in the main a tool for

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371. Amar, *supra* note 370, at 1164.

372. *See id.*

373. AHKIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 30 (1998) (describing earlier formulations of the right to petition as a civil right and not a political right).

374. *See supra* Part I.A.

375. AMAR, *supra* note 373, at 30-32.

376. *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

377. *See id.* at 579 n.5.

378. AMAR, *supra* note 373, at 30.

379. *See generally* Daniel Carpenter & Colin D. Moore, *When Canvassers Became Activists: Antislavery Petitioning and the Political Mobilization of American Women*, 108 AM. POL. SCI. REV. 479, 479-81 (2014) (describing petitioning as crucial in the development of

individuals and minorities.<sup>380</sup> The phrase “the people” in what became the First Amendment largely echoed the broad language of state constitutions, which provided the right broadly to all “people.” Moreover, as Amar has recognized elsewhere, the drafters of the First Amendment rejected the right of instruction, or the ability to bind lawmakers to majority will, describing petitioning as a process distinct from instruction.<sup>381</sup> Rather, the right contained a strong quasi-adjudicative component and often served as a stopgap measure to remedy injuries for which no clear cause of action existed.<sup>382</sup> Legislatures were able to resolve by statute what courts did not have the ability to resolve through existing law, and litigants often converted complaints into petitions in order to receive redress.<sup>383</sup> In this way, as well as others, the historical petition right served as a platform for minority voice in the lawmaking process.

What the history of petitioning reveals is that the right to petition has more in common with the right to procedural due process than it does with free speech.<sup>384</sup> The historical right to petition also provided a much more comprehensive and robust petition right than is recognized today. Similar to the due process right that governs judicial conduct, the petition right governed congressional procedure. The right was limited, however, to procedural protections only; nowhere did it guarantee a favorable policy outcome or secure substantive rights. The petition right preserved only the procedures of

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women’s political participation in advocacy campaigns against slavery and later for suffrage).

380. See *supra* Part I.A.

381. Amar, *supra* note 370, at 1154-56.

382. See *supra* Part I.A.

383. Higginson, *supra* note 34, at 145.

384. Jerry Mashaw’s dignitary due process theory in the context of administrative adjudication provides a helpful overview of the general values implicated by procedural due process, including the “appearance of fairness”; “equality”; and “predictability, transparency and rationality.” See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 482-91 (1986) (reviewing Mashaw’s dignitary due process theory as a framework for noninstrumental values underlying the due process right). Recent work has drawn these values into the political realm to argue for proceduralism as a normative defense of democracy writ large. See, e.g., Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 443-45 (2013). Maria Paula Saffon and Nadia Urbinati, building on early twentieth-century theorists Hans Kelsen and Norberto Bobbio, propose democracy as the best protection for equality and liberty in a pluralist society because it provides the means for collective decisionmaking without substantive demands on outcomes. *Id.* Most importantly, a proceduralist view of democracy would require not simply rights-based limitations on majority lawmaking but also mechanisms of participation for the minority in the lawmaking process. *Id.* at 459-60. Petitioning would provide one such mechanism.

acceptance, consideration, and response<sup>385</sup> for each petition without respect to the political power of the petitioner.<sup>386</sup> The petition right also shared the principles of transparency that underlie the due process right. In compliance with Article I's Journal Clause,<sup>387</sup> the process of consideration for each petition was by default a public process, and members read each petition aloud on the floor; included actions on petitions in the congressional record; and provided petitioners with formal, written responses.<sup>388</sup> The right was also guaranteed. If Congress had jurisdiction to act on a petition and the petition was properly filed, then it afforded that petition formal process.<sup>389</sup> The process afforded each petition was provided according to the merits of each petition and not according to the political power of the petitioner. Also, as directed by the Rules Clause of Article I,<sup>390</sup> Congress established formal rules that governed the consideration of petitions and published those rules in the formal procedural manuals for each house.<sup>391</sup>

However, the historical right to petition protected a substantially narrower right than that recognized by the Court today. In particular, the historical right concerned direct engagement with government only. The right to petition, unlike the right of free speech, concerned legislative advocacy directed toward government and solely through specific, formal channels. Any broader advocacy, even advocacy directed ultimately at legislative reform through electoral action or otherwise, that utilized channels outside those

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385. Stephen Higginson has argued persuasively that the colonists' outrage over the British Crown's failure to respond to their petitions lends strong support to the theory that the Petition Clause required a response. Higginson, *supra* note 34, at 155; *see also* AMAR, *supra* note 373, at 31 ("[T]he right to petition implied a corresponding congressional duty to respond, at least with some kind of hearing."). Hundreds of years of past practice lend support also, wherein colonial, state, and federal legislatures expended valuable resources reading petitions into the record, providing the petitions with a fair hearing, and deciding to grant or deny the petition. *See supra* Part I.A. Given the extensive support for such a theory, it comes as some surprise that Higginson identifies the gag rule debates of the 1830s and 1840s, enacting a blanket ban on all antislavery petitions, as the "abrupt" end of the right to petition. *See* Higginson, *supra* note 34, at 165. Not only does this presumption generalize the contours of a constitutional right from a few highly controversial debates in Congress, it ignores two contrary points: First, it was hardly the death of the petition right; Congress upheld its obligation to respond to petitions for over one hundred years following the gag rule debates. *See* Schneer, *supra* note 172, at 18. Second, like the Revolution, the failure of the petition process over the issue of slavery was followed by war about twenty years later when the South attacked Fort Sumter in Spring of 1861.

386. *See supra* Part I.A.

387. U.S. CONST. art. I, § 5, cl. 3.

388. *See supra* Part I.A.

389. *See id.*

390. U.S. CONST. art. I, § 5, cl. 2.

391. *See supra* Part I.A.



established by government—including speech directed at the public marketplace, newspaper articles, pamphlets, and even protest—would likely fall outside of the Petition Clause’s protections. This is not to say that such action would fail to obtain any constitutional protections whatsoever. As core political speech, these actions would likely implicate the Free Speech Clause, and it is entirely likely that the Free Speech Clause would have provided a more appropriate framework to analyze earlier Petition Clause challenges. However, the relationship between the speech and petition rights, especially when the two come into conflict, is in need of future scholarly attention. Much of the Petition Clause doctrine to date has assumed these rights to be coextensive, largely because the Court has often referred to them interchangeably, without any real analysis of how the two rights can and should interact.<sup>392</sup>

#### B. Implications for the Doctrine

The historical petition right could begin to provide a strengthened, but narrowed, framework to structure future Petition Clause analysis. The impact that a contextualized right to petition could have on our Petition Clause doctrine is twofold: unsettling<sup>393</sup> and unbundling.

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392. See, e.g., *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2491-92 (2011). Once the Court begins to address this question head on, it could have drastic implications for the doctrine. The relationship between free speech rights and other equivalent rights, like due process for court proceedings, is complicated, and free speech rights are often seen as wholly curtailed by the demands of competing rights. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884, 889-90 (2009) (developing a distinctive doctrine for campaign finance in the context of judicial elections because of the procedural due process concerns at issue in courts); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1070-71 (1991) (noting that attorneys’ free speech rights inside and outside of court are properly circumscribed by ethical restrictions that preserve the integrity of judicial functions); see also *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569 (1998).

393. Unsettling, as I use the term here, is not equivalent to “unsettlement theory” as developed by Louis Seidman to describe the Court’s role in “unsettl[ing]” wins and losses during the political process. See LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2001). There have been no real wins or losses through the political process here because taken-for-granted assumptions have likely preempted the question. Rather, unsettling here refers to an attempt to suspend and interrogate the doxa, “the world of tradition experienced as a ‘natural world’ and taken for granted.” PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 164 (Richard Nice trans., Cambridge Univ. Press 1977) (1972). Unsettling here means the constitution of a “field of opinion” or a “critique which brings the undiscussed into discussion, the unformulated into formulation.” *Id.* at 168. Unsettling is important because “[t]he political function of classifications is never more likely to pass unnoticed than in the case of relatively undifferentiated social formations, in which the prevailing classificatory system encounters no rival or antagonistic principle.” *Id.* at 164.

An important contribution of a clarified petition right would be to unsettle the presumption that the Supreme Court has held definitively that the Petition Clause protects all forms of lobbying. This presumption has led to confusion in the doctrine and a lack of reflection in application of the First Amendment and has frustrated efforts to regulate lobbying.<sup>394</sup> Many courts now simply assume without analysis that petitioning and lobbying are synonymous.<sup>395</sup> In a fairly recent example, the D.C. Circuit struck down a Department of Commerce regulation, promulgated in response to an Obama Administration presidential memorandum, banning registered lobbyists from serving on certain advisory commissions on the ground that it was an unconstitutional condition on the lobbyists' Petition Clause rights.<sup>396</sup> In support of the court's presumption that lobbying was protected under the Petition Clause, Judge Tatel, writing for the court, cited to a single 1968 D.C. Circuit opinion that implicated the Petition Clause only tangentially.<sup>397</sup> Rather, the 1968 opinion addressed whether the freedom of speech protected the right of a newspaper to publish documents stolen from a lobbying firm by one of the firm's employees.<sup>398</sup> The two-page opinion referenced the Petition Clause only once, when discussing whether the stolen documents would implicate the public interest.<sup>399</sup> In dicta, the opinion presumed, without analysis or support, that any lobbyist attempting to persuade Congress, presumably by any means, exercises her right to petition and, therefore, the exercise of that right must also fall into the public interest.<sup>400</sup> In drafting *Autor*, the D.C. Circuit relied on dicta from that single 1968 opinion, strengthened no doubt by the Obama Administration's *concession* that lobbying is protected by the Petition Clause, to strike down the ban. Given the nearly ubiquitous presumption that lobbying must be protected under the Petition Clause,<sup>401</sup> the decision prompted little outcry. The Obama Administration declined to petition for certiorari and, instead, quickly amended its policies on lobbyist public service. Contrary to the government's concession in *Autor*, the Supreme Court has yet to resolve the issue of whether the Petition Clause protects lobbying. Both a closer examination of the current doctrine and recognition of the history could begin to highlight the lack of foundation to this assumption.

Second, a contextualized petition right would force an unbundling of the activities we currently conflate into the term "lobbying." A close interrogation

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394. See *supra* Part II.B.

395. See *Autor v. Pritzker*, 740 F.3d 176, 182 (D.C. Cir. 2014).

396. *Id.* at 177-78.

397. See *id.* at 182.

398. *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 490 (D.C. Cir. 1968).

399. *Id.* at 491.

400. See *id.*

401. See *supra* text accompanying note 33.

reveals that lobbying is not one single practice but an amalgam of a broad range of advocacy practices, some triggering more constitutional concern than others.<sup>402</sup> The conflation of these advocacy practices into a single term has led some scholars to suggest that “lobbying” ought to obtain strengthened First Amendment protection or, at the very least, protection under a First Amendment “penumbra” because a “bundle” of practices necessarily implicates a “bundle” of First Amendment protections. Unbundling “lobbying” into a clear articulation of what advocacy practice is at issue in a particular case could bring much-needed clarity to our scholarship and doctrine.

In particular, unbundling could begin to clarify important distinctions between speech, petitioning, and lobbying. Cases like *Noerr*, which addressed the constitutional protections of a lobbying campaign directed at the public through speeches and the press,<sup>403</sup> would fall under the Free Speech Clause, rather than the Petition Clause. Given that the Court has already conflated the speech and petition doctrines in these areas, the substantive impact of converting these to free speech cases, including the *Noerr-Pennington* doctrine, would be negligible. Clarity in the doctrine could, however, allow the Court to develop an independent framework specific to the particular needs and functions of the petition right. Second, a contextualized petition right could provide enough structure to support an independent Petition Clause doctrine. As in *Guarnieri*, the Court has often reflected on history in developing its First Amendment jurisprudence and the broader concerns structuring its free speech analysis often source from this historical reflection.<sup>404</sup> A contextualized petition right could provide structure and a limiting principle to the doctrine and, most importantly, prevent the Court from again conflating petitioning with speech. Moreover, as noted, a distinct Petition Clause doctrine would provide the analytic space to articulate the relationship between the Petition and Free Speech Clauses, no longer assuming they are coextensive simply because of prior doctrinal conflation.

Although complete analysis of the implications of a contextualized petition right for our current doctrine is beyond the scope of this Article, the balance of this Subpart will provide a few examples as illustrations of how the right could impact past and future issues in our lobbying and petitioning doctrine. Part III.B.1 looks backward to explain a longstanding puzzle at the

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402. To provide some examples: “lobbying” that consists of public-directed advocacy during an election, even aimed at influencing legislative outcomes, would fall into the heart of the Free Speech Clause; “lobbying” consisting of direct engagement with government through the formal petition process would fall under Petition Clause protections; “lobbying” consisting of campaign contributions would fall under the Free Speech Clause and the *Buckley* doctrine; whereas “lobbying” consisting of threats and bribes would obtain no protections whatsoever.

403. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129, 138 (1961).

404. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2499 (2011).

heart of lobbying law that the historical petition right might resolve. Part III.B.2 describes issues looming on the horizon for our lobbying doctrine, identified in recent election law scholarship, which a contextualized petition right could avoid. The following Part, Part IV below, looks beyond the current doctrine to analyze the constitutionality of our current lobbying system under a contextualized petition right.

### 1. Making sense of contingency fee contracts

The core of lobbying law has long held a puzzle that a contextualized petition right could resolve. For the past seventy years, the Court has raised the possibility of First Amendment concerns when faced with the slightest restriction on lobbying activity. Belying these constitutional considerations, for much of this nation's history, legislatures and courts have criminalized lobbying and voided lobbying contracts as against public policy without mention of the First Amendment. Zephyr Teachout recently crafted a careful and thoughtful review of this history, concluding that the distinction between earlier cases treating lobbying as a criminal act and later cases invoking First Amendment protections was rooted in a shift in both contract and constitutional law from the nineteenth to twentieth centuries.<sup>405</sup> As Teachout describes, the turn of the twentieth century brought a shift in the courts' usage of contract enforcement as a means to legislate in preservation of public policy.<sup>406</sup> In the early 1900s, criminal law, specifically bribery charges, became the primary tool for courts to confront the corruption concerns raised by lobbying contingency fee contracts.<sup>407</sup> It was this shift in doctrine, Teachout argues, that explains the difference in treatment of lobbying from the earlier contract cases to the Petition Clause cases like *Harriss*.<sup>408</sup>

The history of petitioning provides an alternative, simplified solution to the apparent tension in the lobbying doctrine. The right to petition, as it was exercised in *Harriss*, protects formal engagement with government. The right does not protect, however, efforts to circumvent and undermine that formal process by engagement with Congress through informal means.<sup>409</sup> Contracts struck down by the courts include services such as "procuring legislative action . . . by personal solicitation," the sale of "personal influence to obtain the passage of a private law," and an agreement that a lobbyist would "use his influence to ensure the passage of a law."<sup>410</sup> A court would just as likely void a

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405. Teachout, *supra* note 3, at 6.

406. *Id.* at 17-19.

407. *Id.* at 17.

408. *Id.* at 17-19.

409. *Id.* at 19.

410. *Id.* at 7, 8, 10.

contract between a lawyer and a client for litigation services that included intentionally violating the established rules of civil procedure and using personal relationships to secure additional access to the judge to discuss the case, as it would void a contract for similar services in the context of Congress. In striking down contracts for lobbying services, the courts were explicit, however, that contracts for services in circumvention of the formal petition process by engaging with Congress through informal means were voidable, while contracts for representation during the formal petition and legislative process were not.<sup>411</sup> The courts made clear that the latter contracts would not be against public policy and might even obtain constitutional protection.<sup>412</sup>

While Teachout's explanation for the tension in the doctrine could hold true, the contextualized petition right provides a simpler explanation: the Petition Clause protects only that conduct in comportment with the formal process and not efforts to engage informally with Congress. Contracts for services that circumvent the petition process would not obtain constitutional protection.

## 2. Lobbying is not the new campaign finance

Finally, an increasing number of scholars, primarily from the election law community, have begun to speculate that the Court's steady dismantling of the campaign finance regulatory framework under the Free Speech Clause doctrine of *Buckley v. Valeo*<sup>413</sup> and especially its progeny, *Citizens United v. FEC*,<sup>414</sup> raises strong concerns about the constitutionality of any lobbying regulation, including our current disclosure regimes.

Elizabeth Garrett, Ronald Levin, and Theodore Ruger first raised the issue in their chapter in the lobbying bible, *The Lobbying Manual*.<sup>415</sup> As they describe it, the foundational regulatory scheme governing lobbyists, the Lobbying Disclosure Act, "is primarily justified on the ground that it combats political corruption," and, therefore, the disclosure provisions that compelled lobbyists to share data on quarterly expenditures could run afoul of the *Buckley* doctrine if not narrowly tailored enough to address quid pro quo corruption.<sup>416</sup> In particular, Garrett, Levin, and Ruger took issue with the fact that the lobbying expenditure disclosure requirements did not require disclosure of *enough* information, including more detailed information tying expenditures to

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411. *See id.* at 9.

412. *See id.* at 19.

413. 424 U.S. 1 (1976) (per curiam).

414. 558 U.S. 310 (2010).

415. Elizabeth Garrett et al., *Constitutional Issues Raised by the Lobbying Disclosure Act*, in *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE*, *supra* note 183, at 197, 199.

416. *Id.* at 201.

specific lawmaker targets, which they argue would more closely target disclosure of a quid pro quo relationship.<sup>417</sup> The absence of a clear tie between the disclosure requirements and the ability to discern a quid pro quo relationship left the regime on a shaky foundation under the *Buckley* doctrine, assuming a corruption-based state interest.<sup>418</sup>

Following the *Citizens United* decision in 2010 and its constriction of the corruption state interest, Rick Hasen published a comprehensive treatment of lobbying law, declaring all future lobbying regulation under fire and offering a new state interest in “promoting national economic welfare” as a motivation for future regulation.<sup>419</sup> If lobbying regulation had been on shaky footing before the Court issued *Citizens United*, Hasen declared that the lower courts would use the “[Supreme] Court’s new deregulatory campaign finance jurisprudence” to steadily dismantle all forms of lobbying regulation.<sup>420</sup>

In support, Hasen provided two examples: First, the Second Circuit in *Green Party of Connecticut v. Garfield* applied *Citizens United* to strike down a Connecticut law that banned campaign contributions from lobbyists, the lobbyists’ spouses, and the lobbyists’ dependent children to candidates for state office and banned lobbyists from soliciting contributions, or fundraising, on behalf of a candidate.<sup>421</sup> Second, the Southern District of Ohio in *Brinkman v. Budish* applied *Citizens United* to strike down an Ohio revolving door ban that prohibited former state lawmakers and their staff from appearing before the state legislature as lobbyists for a year after leaving public service.<sup>422</sup> To Hasen, these decisions marked the rising tide of challenges that lobbying regulation faced after *Citizens United*.<sup>423</sup>

Hasen’s article also followed on the heels of a number of election law scholars, most prominently Richard Briffault and Heather Gerken, who declared lobbying to be the “new campaign finance” and called for increased attention to the topic in the burgeoning field of election law.<sup>424</sup> This declaration was not simply the reformer’s spirit looking for a more fruitful avenue of reform. Gerken described the two as inseparable, both factually and theoretically:

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417. *Id.* at 201-02.

418. *Id.*

419. Hasen, *supra* note 3, at 197.

420. *Id.* at 195.

421. *Id.* at 195-96; *see also* *Green Party of Conn. v. Garfield*, 616 F.3d 189, 192-93 (2d Cir. 2010).

422. Hasen, *supra* note 3, at 196; *see also* *Brinkman v. Budish*, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010).

423. Hasen, *supra* note 3, at 195.

424. *See* Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL’Y REV. 105, 105 (2008); Gerken, *supra* note 5, at 1155.

Money is just a visible symptom of the hydraulics of political influence. If we think about campaign finance in these terms, it is hard to imagine why anyone would neglect lobbying. It is the other natural means of seeking political influence. As long as lobbying and campaign finance work in tandem with one another, we should not study one without studying the other. Both are simply different means to achieve the same set of political ends. They are not isolated systems that are separate from one another.<sup>425</sup>

Briffault shared Gerken's perspective that lobbying and campaign finance were largely similar in that they are both "vital to representative democracy," involve information and communication, raise common concerns about unequal wealth and unequal influence in the political process, and inspire concerns over improper influence or corruption.<sup>426</sup> Briffault, however, went on to develop some of the distinctions between lobbying and campaign finance, including noting some important differences in the role of political equality between the two practices:

Political equality plays a far smaller role in lobbying regulation. . . . Operationally, it is difficult to imagine a set of rules that could give each adult resident citizen an equal say on every issue subject to lobbying without choking off lobbying itself. Capping the amounts an individual or group could spend either on hiring a lobbyist or on lobbying personally would cut directly into the amount of lobbying the individual or group could undertake.<sup>427</sup>

Rather than claiming that egalitarianism held no place in the context of lobbying, Briffault called for a form of equality theory that comports with the specific concerns of the petition process.<sup>428</sup> Unlike the *equality of influence* generally espoused by election law scholars in the context of elections and the value of "one person, one vote," however, Briffault recognized that engaging with the lawmaking process demanded a different kind of equality—namely, a *procedural equality*, akin to equality of access to courts:

All citizens have a formal equal right to seek to lobby their legislature, and all individuals, organizations, or interest groups affected by a legislative proposal should have an equal opportunity to present their case to the legislature. . . . This, however, is not a matter of the political equality of individuals per se, but of structuring fair competition among contending interest groups.<sup>429</sup>

Given the dearth of scholarship focused on lobbying and petitioning, the growing attention by the election law community to the issue of lobbying and lobbying regulation is most welcome. But as earlier parts describe, it is unclear whether the election law frames of the electoral process and the Free Speech

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425. Gerken, *supra* note 5, at 1162.

426. Briffault, *supra* note 424, at 107-08.

427. *Id.* at 113.

428. *Id.* at 113-14.

429. *Id.* at 114.

Clause, as well as the community's ongoing debates over political equality<sup>430</sup> and political corruption,<sup>431</sup> are appropriate for the particularities of the law of lobbying. Our current lobbying system is no doubt entrenched deeply in our system of campaign finance. As Briffault recognized, however, the important questions and concerns in the context of petitioning during the lawmaking process are different from and often in tension with the concerns of elections and campaign finance.<sup>432</sup> Most notably, the electoral process serves as a mechanism of representation that aims to capture the will of the majority, while the petition process provides a counterpoint mechanism of representation for minorities and individuals to engage in the lawmaking process.

The history of petitioning and the specific text of the Petition Clause counsel against conflation of the electoral and the legislative processes. These two contexts present wholly different dynamics. Elections rely on a majoritarian decision rule to select the composition of Congress, a rule necessarily dependent upon equality of influence, and involve political speech that falls into the core of the Free Speech Clause and its "marketplace of ideas" model. By contrast, the mechanism of petitioning rejected a majoritarian decision rule and instead established a platform for engagement during the lawmaking process, like that of a court, to give voice to individual and minority grievances. Unlike speech in the context of elections, petitioning is not directed at influencing public discourse, electoral outcomes, or the

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430. *Id.* at 113-14.

431. *Id.* at 108. One potential exception is the theory of institutional corruption developed by Lawrence Lessig. LAWRENCE LESSIG, *REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* 238 (rev. ed. 2015). Unlike other theories of political corruption, Lessig's institutional corruption focuses on systemic corruption, or ways in which intended mechanisms of representation are undermined or "corrupted" by competing mechanisms. *Id.* at 18. His paradigmatic example is that of the "green primary," or a private market for campaign fundraising that decides which candidates are able to run in an election based on how much the campaigns can raise from the wealthy. *Id.* at 11-16. Citizens can still technically vote for the candidates selected by the green primary, but the structure of our electoral system is "corrupted" by this earlier process that makes our votes less functional. *Id.* Scholars of the First Amendment might recognize strong parallels between this instance of institutional corruption and that of Robert Post's "electoral integrity." See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 60 (2014); see also *Doe v. Reed*, 561 U.S. 186, 198 (2010) (recognizing the state interest of "electoral integrity" in the context of ballot initiatives). However, Lessig's theory of institutional corruption sweeps more broadly than elections and could capture some of the dynamics of our lobbying system as well. Similar to the green primary that corrupts our intended electoral system, lobbying is an institutional corruption of the petition process envisioned by the Petition Clause.

432. Briffault, *supra* note 424, at 109-10.



marketplace of ideas.<sup>433</sup> Given these differences, conflation of the mechanism of the vote and the mechanism of petitioning makes little sense and could undermine efforts to design and enact a system of public engagement with the lawmaking process that satisfies the particular countermajoritarian function that petitioning was intended to serve.

This conflation also does not bode well for clarity in the doctrine. Without much reasoning or support, the lower courts have begun to assume that the *Buckley* doctrine applies to all lobbying regulation. Such an approach overlooks critical constitutional distinctions between regulation of the electoral process and regulation of the lawmaking process. Hasen highlights one poignant example in *Brinkman v. Budish*,<sup>434</sup> where the Southern District of Ohio applied *Citizens United* to strike down an Ohio revolving door ban—a law that prevented former state lawmakers and their staff from petitioning the lawmaking process for one year after public service.<sup>435</sup> Without reflection on the important distinctions between *Brinkman* and *Green Party of Connecticut*, Hasen relies on these two cases to declare a new era for all attempts to regulate lobbying post-*Citizens United*.<sup>436</sup> While Hasen’s concern over judicial deregulation might ring true in the context of lobbyist participation in the campaign finance system—the area of regulation challenged in *Green Party of Connecticut*—the ban on petitioning challenged in *Brinkman* presents an entirely different question.

*Buckley* and its progeny have developed as a doctrine specific to speech and, in particular, speech and the financing of speech in the context of electoral campaigns.<sup>437</sup> This doctrine has clear application to a First Amendment challenge to the Connecticut campaign finance laws challenged in *Green Party of Connecticut v. Garfield*.<sup>438</sup> By contrast, the ban on petitioning challenged in *Brinkman* holds no clear relationship to campaign finance or the electoral process whatsoever.<sup>439</sup> While *Citizens United* included some loose language

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433. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (“The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.”).

434. Hasen, *supra* note 3, at 196; see also *Brinkman v. Budish*, 692 F. Supp. 2d 855, 858 (S.D. Ohio 2010).

435. Hasen, *supra* note 3, at 196.

436. *Id.* at 195–96.

437. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (per curiam) (holding that provisions limiting the amount which any individual could spend independent of a particular candidate impermissibly abridged freedom of speech); *Citizens United v. FEC*, 558 U.S. 310, 319 (2010) (holding that the government may not, under the First Amendment, suppress political speech on the basis of the speaker’s corporate identity).

438. 616 F.3d 213, 245 (2d Cir. 2010).

439. *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863 (S.D. Ohio 2010).

regarding lobbying law,<sup>440</sup> nothing in that case dealt with lobbying regulation, petitioning, or the Petition Clause. Rather than ushering in a new era for all lobbying regulation, it is likely that *Brinkman* was simply an outlier case that wrongly applied a free speech doctrine to a Petition Clause case.

The application of *Buckley* and its progeny to regulation of the petition process is likely a mistake of the litigation process. As Garrett, Levin, and Ruger observed, as campaign finance and lobbying have become all the more entwined, most governments describe their lobbying regulations as motivated by an interest in preventing corruption. When asked by the Southern District of Ohio in *Brinkman* why it had passed its lobbying ban, the Ohio government proffered that it had passed the law to prevent corruption and the appearance of corruption. Among other corruption concerns, Ohio wanted to prevent the corruption that would occur from former legislators “using their close relationships with former colleagues and special knowledge of the legislative process to gain access as lobbyists in ways that provide them unequal access to public officials [in comparison] to that of others petitioning the government.”<sup>441</sup> In interpreting whether Ohio had met the proper standard to prove the corruption state interest, the court turned to the *Buckley* doctrine—specifically *Citizens United*—the only doctrine that defines the corruption state interest.<sup>442</sup> In determining whether unequal access to lawmakers during the lawmaking process would constitute corruption, the court responded that under *Citizens United*, a case that noted explicitly that unequal access was not corruption, it would not.<sup>443</sup> Not only does conflation of campaign finance and lobbying in the election law scholarship risk missing the theoretical nuances specific to petitioning, it risks a similar dismantling of lobbying regulation under the Free Speech Clause as that fated to campaign finance reform.

#### IV. Contextualizing Our Current Lobbying System

##### A. Our Current Lobbying System

Although lobbying and money in politics are increasingly vilified for “corrupting” our political process, little empirical evidence exists to support

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440. *Citizens United*, 558 U.S. at 369.

441. *Brinkman*, 692 F. Supp. 2d at 863 (alteration in original).

442. *Id.*

443. *Id.* It also bears noting that, even if a litigant should raise a challenge to regulation of the petition process under *Buckley*, the Court could always hold the doctrine inapposite on other grounds. Specifically, regulation of the petition process is better suited to the campaign finance doctrine developed for the judiciary, in the context of due process rights, and distinguished explicitly from *Buckley* in *Citizens United*. See *Citizens United*, 558 U.S. at 360.

the conclusion that undue influence causes lawmakers to shift their votes.<sup>444</sup> Despite the best efforts of generations of political scientists, empirical studies of Congress have found only indeterminate evidence that campaign contributions and political power lead to more favorable policy outcomes. The few studies that have focused on lobbying exclusively have reached similar conclusions, finding little correlation between positive substantive outcomes and lobbying expenditures.<sup>445</sup> The steady influx of millions of dollars in campaign contributions and billions of dollars expended on lobbying reminds empiricists, however, that rational political donors continue to find a reason to invest in lobbying and campaign contributions. As a consequence, despite years of dissatisfying findings, political scientists continue to try to find an empirical connection between resources and influence on outcomes. This struggle has only intensified in the years following *Buckley v. Valeo* and the Court's use of the doctrine to steadily dismantle Congress's ability to regulate the political process and to narrow "undue influence" to quid pro quo transactions.

By contrast, it has been settled for decades that Congress affords greater consideration and access to the lawmaking process to those who have provided campaign contributions and to the politically powerful. Political theorists have long speculated that contributions and political power bought access in Congress.<sup>446</sup> But starting in the 1980s, empiricists dissatisfied with the inability to find a correlation between political money and roll call votes turned their methods to study other measures of influence on the lawmaking process.<sup>447</sup> Using survey data that charted time usage by a random sample of members of the House from the ninety-fifth Congress combined with FEC data on campaign contributions, Laura Langbein found that PAC contributions significantly increased the likelihood that an interest group would gain access to a lawmaker with the "cost" of lawmaker time ranging from \$6400 for less than twenty-five minutes to \$72,300 for an hour with a lawmaker.<sup>448</sup> A few years later, Richard Hall and Frank Wayman used interviews and markup records to study the relationship between PAC contributions and the allocation

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444. See, e.g., Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 116 (2003).

445. See, e.g., FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 25 (2009).

446. J. David Gopoian, *What Makes PACs Tick?: An Analysis of the Allocation Patterns of Economic Interest Groups*, 28 AM. J. POL. SCI. 259, 262 (1984); James F. Herndon, *Access, Record, and Competition as Influences on Interest Group Contributions to Congressional Campaigns*, 44 J. POL. 996, 997 (1982); Alexander Heard, *Money and Politics* 14-15 (Public Affairs Pamphlet No. 242, 1956).

447. Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1053 (1986).

448. *Id.* at 1059-61.

of access and attention to an issue in three congressional committees.<sup>449</sup> Hall and Wayman found a strong correlation between campaign contributions to members already ideologically aligned with an issue and increased access to those members and increased attention by those members to the donor's issue.<sup>450</sup>

More recent studies have confirmed earlier results. A randomized field experiment of 191 congressional offices revealed that senior policymakers made themselves available for a meeting three-to-four times more often if the person trying to schedule the meeting was an identified campaign contributor.<sup>451</sup> The presumption that access to lawmakers is contingent on a relationship with that member, built through campaign contributions and other forms of electoral power, has become profoundly uncontroversial. Taking the correlation between access and political power as given, political scientists have now started to focus on analyzing stratification within politically powerful groups. They are finding even further entrenchment of who gains access to lawmakers as the costs of building relationships with members increase over time.<sup>452</sup> Unlike campaign contributions affecting policy outcomes, the fact that Congress affords access and process unequally and based on political power has become settled doctrine in political science.

It is perhaps even less controversial to claim that those who are able to muster the political capital to secure access to lawmakers are afforded wholly arbitrary, informal, and unequal process. As Langbein's findings demonstrate, the amount of time spent with a lawmaker correlates closely with the political power of the individual securing the meeting, so the less politically powerful can expect far less time and, by inference, less process devoted to their issues as a result.<sup>453</sup> The little process that petitioners can expect, if any, is incredibly informal, and no standards exist to provide minimum requirements or ethical guidelines.<sup>454</sup>

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449. Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 798 (1990).

450. *Id.* at 798-99.

451. Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, AM. J. POL. SCI. (forthcoming), <http://onlinelibrary.wiley.com/doi/10.1111/ajps.12180/epdf>.

452. See, e.g., Thomas Groll & Maggie McKinley, *Modern Lobbying: A Relationship Market*, CESIFO DICE REP., Autumn 2015, at 15; Thomas Groll & Christopher J. Ellis, *Dynamic Commercial Lobbying* (Ctr. for Econ. Studies & Ifo Inst., Working Paper No. 4114, 2013) (on file with author); Lee Drutman et al., *The Interest Group Top Tier: More Groups, Concentrated Clout* (Aug. 21, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2453733>.

453. Langbein, *supra* note 447, at 1057-60.

454. See, e.g., Deanna R. Gelak, *Communicating with Congress*, in THE LOBBYING MANUAL, *supra* note 183, 605, 605-18 (describing the lobbying process); Thomas Ross, *Ethics Law and the Lawyer/Lobbyist*, in THE LOBBYING MANUAL, *supra* note 183, at 689, 691-94.

By contrast to our historical petition process, which was governed by formal rules, public process, and nonarbitrary consideration, our current lobbying system consists entirely of informal and opaque norms, customs, and practices. An individual who wants to engage with the lawmaking process in Congress could obtain a meeting with a member or her staff at which the individual could deliver her “one-pager,” a customary lobbying document that outlines the policy issue, and her “ask,” a request for specific legislative action.<sup>455</sup> But she could also receive no response to her request to meet—instead she might have to meet with a member at a fundraiser for the member’s campaign and deliver her “one-pager” and her “ask” along with her contribution of \$1000 for individuals or \$2500 for a PAC.

When it comes to our lobbying system of today, no procedure is guaranteed and there are no clear rules. Contrary to historical congressional practice, neither chamber drafts parliamentary rules outlining the procedures of our current lobbying system. Unlike court process, the default expectation is that contact with the legislature will be shielded from public view, and no public record exists to provide the due process protections that public scrutiny affords. The informality and opacity of the lobbying system has essentially closed the process to nonprofessionals and noninsiders.<sup>456</sup> No government websites document the process by which individuals may lobby Congress or describe the formalities of lobbying consideration. The few texts to describe the process are confined to manuals for professional lobbyists and describe an entirely informal system of customs and norms.<sup>457</sup> Unlike the rules of civil procedure and other due process requirements, few laws govern the means by which the public engages with Congress, and those that do tend to articulate only the boundaries of the process through ethics rules, lobbying restrictions, and criminal bribery laws.<sup>458</sup> No formal structure exists to ensure that our current lobbying system comports with the petition right.

#### B. Implications of the Petition Right for Our Lobbying System

As empirical work in political science demonstrates, Congress has developed through our current lobbying system an informal petitioning

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(describing the process by which lobbyists who are lawyers may opt out of professional ethics rules for lawyers).

455. Gelak, *supra* note 454, at 612-13.

456. Drutman et al., *supra* note 452, at 1-3.

457. See GARY J. ANDRES, LOBBYING RECONSIDERED: POLITICS UNDER THE INFLUENCE (2009); BERTRAM J. LEVINE, THE ART OF LOBBYING: BUILDING TRUST AND SELLING POLICY (2009); PAT LIBBY & ASSOCS., THE LOBBYING STRATEGY HANDBOOK: 10 STEPS TO ADVANCING ANY CAUSE EFFECTIVELY (2012); ERNEST WITTENBERG & ELISABETH WITTENBERG, HOW TO WIN IN WASHINGTON: VERY PRACTICAL ADVICE ABOUT LOBBYING, THE GRASSROOTS, AND THE MEDIA (2d ed. 1994); Gelak, *supra* note 454, at 605-22.

458. See TASK FORCE ON FED. LOBBYING LAWS, *supra* note 31, at 4-5.

mechanism that is opaque and unorthodox and that provides preferential access to the lawmaking process to the politically powerful. Our current lobbying system has become mundane and routinized inside Congress as members engage daily with constituents, lobbyists, and other interested parties to gather information and hear grievances. Although Congress has not passed a statute that limits the right to petition, it has developed an extensive system of informal procedures that does just that. These informal procedures constitute what Francis Lieber termed the “common law” of Congress and what I term, borrowing from recent work by Victoria Nourse, “legislative common law.”<sup>459</sup> Similar to the means by which the rules of civil procedure and laws of evidence constitute due process in courts, it is through the enactment of this legislative common law that Congress constitutes the petition process.

By affording access to the lawmaking process unequally, conditioned on the political power of the petitioner, and on an arbitrary, informal, and opaque basis, Congress is violating the Petition Clause. Rather than establishing a mechanism for petitioning that comports with the right, Congress has essentially conflated the functions and principles of the electoral process into the lawmaking process. The electoral process, and the core principles of the speech right that protect it, functions to foster a free and competitive marketplace of ideas where the most popular ideas rise above the din, shape electoral conduct, and are then resolved through a majoritarian decision rule. Petitioning, by contrast, provided a mechanism for individuals and minorities to have a voice in the lawmaking process that more closely resembled the procedural due process right afforded litigants in court. The right was individual and protected certain procedural guarantees, including consideration and response. In conflating these two distinct mechanisms of representation, Congress has carried forward the majoritarian decision rule intended to resolve public decisionmaking during the electoral process into the distinctive process of petitioning. Put simply, our current lobbying system violates the right to petition.

### 1. Remedies

To resolve Congress’s current violation of the right to petition, I propose that Congress at minimum formalize the petition process and establish procedures whereby it would afford public and equal access to the lawmaking process. In many ways, such a system would resemble an Administrative Procedure Act<sup>460</sup> for Congress. Establishing such a system would require more than our current lobbying registration and disclosure regime. In place of our

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459. Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 362 (2014) (citing FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 188-89 (3d ed. 1877)).

460. 5 U.S.C. §§ 552-59 (2014).

current Lobbying Disclosure Act,<sup>461</sup> Congress should enact, either through rules or by statute, formal guidelines to make transparent and predictable the consideration it will afford. This proposed solution would not require any prohibitions or lobbying bans. Rather, Congress could regulate both the petition process and efforts to circumvent that process through “lobbying” by preempting the field and establishing comprehensive regulation that governs affirmatively when and how the public may engage with Congress.

Ideally, this comprehensive system would resemble the petition process that served our legislatures well for over a hundred years and that the Framers protected with the Petition Clause. As described, this quasi-adjudicative process considered grievances submitted by petitioners as formal filings, which contained a statement of grievance, arguments in support of the grievance, signatures in support of the petition, and occasionally supplemental materials like proposed legislative language or other supportive evidence. By contrast to contemporary legislative practice, members would always know of the source of proposed statutory language and other materials introduced through the petition process. Members would read these petitions aloud on the floor of Congress and then refer the petition to the appropriate committee, executive agency, or adjudicative body.<sup>462</sup> Whatever the substantive outcome, Congress would afford petitioners formal consideration of their petitions, and action on the petition would become part of the congressional record.<sup>463</sup> As lobbying drives the congressional agenda today,<sup>464</sup> Congress could allow petitions to drive the legislative agenda in place of our current lobbying system. In response to voluminous numbers of similar petitions, Congress could resolve the issue as it has historically by either consolidating the petitions or by creating new government institutions to process the petitions. In fact, Congress dealt with problems of volume historically by creating much of the administrative state and specialized courts, including the Patent and Trademark Office and the Court of Claims, for example. Congress could resolve frivolous petitions through summary dismissal.

By establishing the petition process affirmatively, Congress could also clarify what constitutes improper procedure and access. Congress could then regulate engagement with Congress and lawmakers outside of the formalized petition process through disclosure and ethics rules, including recusal rules similar to those that govern judges. This is not to say that lawmakers could no longer engage with the public. A conversation at a town hall to clarify a

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461. Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-14 (2014).

462. See *supra* Part I.B.

463. See *id.*

464. Frank R. Baumgartner et al., *Money, Priorities, and Stalemate: How Lobbying Affects Public Policy*, 13 ELECTION L.J. 194, 201-02 (2014) (finding a significant correlation between the agenda of lobbyists and the agenda of Congress and almost no correlation with the agenda identified by the public).

lawmaker's policy position before an upcoming election could be ethical, and lawmakers could still reach out to the public for hearings and other formal processes. By contrast, listening to an individual grievance and accepting draft statutory language to resolve that grievance at a fundraiser could be subject to disclosure requirements, ethics restrictions, and recusal requirements. Lawmakers would be required to disclose those all-too-common text messages from powerful lobbyists that direct questions during hearings. To the extent that Congress found these and other circumventions too disruptive of the lawmaking process, Congress could begin to limit these circumventions. A formal petition process could also allow professionalization of the representatives who represent the public in the formal petition process. As we now regulate lawyers who represent their clients before formal government proceedings in courts and otherwise, we could begin to establish professional standards and ethics restrictions for those highly trained policy experts now employed as lobbyists. Not only would professionalization benefit the petition process and the client, but professional lobbyists might also welcome the heightened stature and improved public understanding of their now vilified profession.

## 2. Objections

First, adopting this proposed solution would inevitably face problems of scale. Some historians speculate that the formal petition process died out in Congress because lawmakers struggled to manage the sheer volume of petition submissions as the country grew.<sup>465</sup> This theory suffers from some yet unexplored flaws, but the fact remains that today's Congress represents a polity of over 320 million individuals and tackles a host of modern regulatory issues far more complex than in earlier centuries. Federal jurisdiction has also expanded and with it the range of possible matters on which petitioners might express grievances. These criticisms do not consider, however, that while formal petitioning in Congress may have fallen by the wayside, public engagement with Congress has not. In response to an industry that some speculate may exceed \$8 billion in expenditures per year, Congress is necessarily spending resources and affording informal process to the public. Congress has established a *de facto* petition process and is attempting to address

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465. Pasley, *supra* note 21, at 60. There are some fundamental flaws in this theory that current scholarship is beginning to explore, including the fact that Congress resolved problems of scale in the petition process historically by constructing much of the administrative state. The early congressional origins of the administrative state and the nuanced Founding-era view of separation of powers and lawmaking have been recently and masterfully documented. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1297 (2006). The connection between this early American institutional development and the petition process has yet to be explored.



scalability and complexity problems by establishing an informal, grey market system that affords preferential access and process to the politically powerful.

There is no doubt that concerns over feasibility should inspire caution and further discussion on questions of institutional design, but problems of scale should not preclude reform of our lobbying system for two reasons. First, our government has confronted and resolved problems of scale in a number of other areas. For example, our extensive system of lower federal courts did not exist at the Founding but has scaled appropriately in response to increased federal jurisdiction and volume of litigants.<sup>466</sup> Congress could summarily dispose of frivolous motions and could consolidate duplicative motions. In addition to simple expansion, the courts have also developed an extensive system of procedural rules to routinize and streamline the litigation process.<sup>467</sup> Our heavy reliance, for better or worse, on pretrial motion practice and the settlement process to dispose of actions has been a functional solution to problems of scale.<sup>468</sup> Along similar lines, our administrative agencies have developed complex and large-scale means of public engagement through the formal notice-and-comment process. There is little that would prevent Congress from adopting these and other similar measures to respond to issues of scalability. Moreover, advances in technology in the twenty-first century offer additional solutions to problems of scale not available historically.<sup>469</sup> Second, and most importantly, issues of scale should not preclude future reforms because our current lobbying system is constitutionally inadequate. Preserving the status quo is simply not an option if Congress aims to comply with its obligations under the Petition Clause.

A second objection is that this proposed solution could create tension between the Petition Clause and other First Amendment rights, most notably speech and association. On further reflection, however, this tension could actually prove beneficial. The upside to a fully articulated petition process is

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466. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 3-39 (First Harvard Univ. Press paperback ed., 1999).

467. *Id.*; see also Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293, 294 (1924) (making the case for the later-implemented federal rules).

468. See, e.g., Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 751-54 (1992) (prescribing a number of reforms to streamline efficiency in the federal courts in the face of rising demands on both civil and criminal dockets).

469. See, e.g., STEPHEN GOLDSMITH & SUSAN CRAWFORD, *THE RESPONSIVE CITY: ENGAGING COMMUNITIES THROUGH DATA-SMART GOVERNANCE* 1 (2014). Project Madison, a platform for legislative engagement born from a hack-a-thon held within the House of Representatives and used to allow for the first “crowdsourced” markup of a bill on the House, provides an early example of the possibilities for technological solutions. See Richa Mishra, *Frontiers of Democracy Research: A Fresh Perspective on Lobbying and Political Access*, ASH CTR. FOR DEMOCRATIC GOVERNANCE: CHALLENGES TO DEMOCRACY (Aug. 5, 2014, 8:25 AM), <http://www.challengestodemocracy.us/home/frontiers-of-democracy-research-a-fresh-perspective-on-lobbying-and-political-access>.

that it would force the courts to begin to clarify the relationship between the Petition Clause and the Free Speech and Association Clauses, as it has done in other contexts. In confronting this tension elsewhere, the Supreme Court has routinely held that limitations on speech and associational rights do not violate the Constitution if those limitations protect government processes. To provide three poignant examples: The Court, per Justice Scalia, upheld a law which restricted the right to speak on the floor of a state legislature as a reasonable protection of the lawmaking process.<sup>470</sup> Similarly, the Court has held that a restriction on ballot information was a reasonable regulation of the electoral process and did not violate a challenger's speech and associational rights.<sup>471</sup> Kathleen Sullivan has meticulously documented the myriad restrictions on the ability of lawyers to speak in violation of court rules upheld as reasonable protections of the judicial process.<sup>472</sup> If these other contexts are any indication, any Free Speech Clause protections for lobbying will give way to the right to petition when lobbying undermines the petition process.

Finally, some might argue that a petition right analogous to a procedural due process right has no place in the majoritarian institution of Congress and that, as a so-called "political branch," Congress should be more "democratic" than the courts. Under a simple model of democracy, the need to be responsive to majoritarian pressures throughout the lawmaking process could justify affording more access and consideration to those with political power. This presupposition, however, relies on two misconceptions. First, it ignores the key distinction that exists between the electoral process, governed by a majoritarian-decision rule,<sup>473</sup> and the lawmaking process, which was designed

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470. Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347, 2351 (2011) ("Legislative sessions would become massive town-hall meetings if those who had a right to speak were not limited to [lawmakers] who had a right to vote. . . . This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message."); see also Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520, 531 (9th Cir. 2015) (en banc) (delineating the distinctions between First Amendment rights in the electoral context and those in the lawmaking context).

471. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362-63 (1997) ("We are unpersuaded, however, by the party's contention that it has a right to use the ballot itself to send a particularized message, to its candidate and to the voters, about the nature of its support for the candidate. Ballots serve primarily to elect candidates, not as forums for political expression.").

472. Kathleen M. Sullivan, *supra* note 392, at 569 ("Lawyers' freedom of speech is constrained in many ways that no one would challenge seriously under the First Amendment. Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice, much like rules of order in a town meeting.").

473. This distinction tracks that drawn by Adrian Vermeule between majoritarianism writ large, or decisions made by an electoral mass to select partisan representatives "like bundles of issue-preferences," and majoritarianism writ small, or "voting in a series of single-issue referendums." Adrian Vermeule, *The Force of Majority Rule*, in MAJORITY

to be more complex than a simple majoritarian system.<sup>474</sup> Conflation of the electoral and lawmaking processes ignores the long history of legislatures, including Congress, that provided formal, equal access to the lawmaking process for individuals and minorities through the petition process<sup>475</sup> and the protection of that right through ratification of the Petition Clause.<sup>476</sup> As discussed, the drafters of the Petition Clause considered and explicitly rejected the right to instruct representatives, whereby a majority could bind a lawmaker to its will.<sup>477</sup> Debates around the Petition Clause described the right as one that was inherently individual and the petition process as a platform for individual voices in the lawmaking process.<sup>478</sup> Second, we need to evaluate critically the foundations of our assumptions that legislatures are strictly majoritarian institutions and that the absence of majoritarian legislative outcomes undermines our Congress. A critical gaze might reveal the lack of any foundation at all to these assumptions. Rather, our Constitution established a republican form of government,<sup>479</sup> and although that term is itself ambiguous, it is well settled that a republican form of government is not a direct democracy.<sup>480</sup>

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DECISIONS: PRINCIPLES AND PRACTICES 134-35 (Stephanie Novak & Jon Elster eds., 2014). One is a manner of selecting representatives only, without necessarily driving substantive outcomes and the procedures by which those substantive outcomes are reached. There is of course some relation between the two, but the relation has been highly disputed to date as a matter of political and moral theory. *See also* HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 1-13 (Univ. of Cal. Press paperback ed., 1972).

474. *See, e.g.*, ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 85-114 (2007) (listing “submajority” voting rules across a range of institutions, including Congress, and describing these mechanisms as a stable means of allowing minorities to “force a kind of public accountability upon the majorities who would otherwise prefer to sweep minority views and desires under the rug”). This Article frames petitioning as an additional structural right, akin to procedural due process, and a mechanism of minority protection. In so doing, it joins the growing body of scholarly discourse challenging the majoritarian-protecting structure and minority-protecting rights distinction. *See, e.g.*, Heather K. Gerken, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U.L. REV. 587, 594-95 (2015).

475. *See supra* Part I.B.

476. *See supra* Part II.B.

477. *See supra* Part I.B.

478. *See supra* Part III.A.

479. *See supra* Part I.B.

480. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 105, at 46-47 (distinguishing a “pure” or direct democracy from the proposed republican or representative national government outlined in the Constitution).

### **Conclusion**

On one level, this is an article about lobbying and about the need for a paradigm shift in how we are approaching reform. This Article's main focus of inquiry, however, is not simply lobbying but rather Congress, an institution much reviled by the public and largely ignored by the legal academy. Congress has, in some senses, fallen into an intellectual jurisdictional hole. On the one hand, political scientists find the lawmaking process too "legal" to involve their discipline and, on the other hand, legal scholars recoil at an institution they envision as devoid of law and driven by politics all the way down. Our neglect has likely contributed to the institution's current dysfunction. It is time that we begin to see the lawmaking process as again the domain of lawyers and open a discussion as to the theory and law that should structure that process.

In illuminating the history and theory behind the petition process and the Petition Clause, this Article takes an early step toward developing an affirmative vision of how Congress should function within our constitutional framework. In particular, this Article begins the work of articulating a concrete vision of how Congress should engage with the public outside of the vote. Historically, Congress engaged with the public through a formal, nonarbitrary, transparent, and equal process called petitioning. Because the petition process was designed to protect individuals and minorities, the process was not contingent on the political power of the petitioner. The unenfranchised engaged in petitioning, and lawmakers did not require a minimum signature count to obtain review and response. We often assume that legislatures and the lawmaking process are as majoritarian as the vote; history provides a more nuanced view. The Framers codified the right to petition in the First Amendment. To date, we have presupposed, often without support or reasoning, that the current way that Congress engages with the public—that is, our current lobbying system—is constitutionally protected by the right to petition. But a closer look reveals that our current lobbying system, which is informal, arbitrary, and opaque and which provides preferential treatment to the politically powerful, provides none of the values protected by the petition right. In failing to satisfy even the basic requirements of the petition right, Congress is violating our right to petition.

At best, clarity in the right to petition and Congress's obligation to the public under that right could motivate Congress toward reform. The legislative histories of earlier efforts at reform appear to turn on confusion over the scope of the Petition Clause. The more cynical among us, however, can at least hope that clarity in the petition right might stimulate the external pressure necessary, either by the public or the courts, to bring about much-needed reform.